IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1546

WILLIAM H. STAFFORD, JR., STUART J. CARROUTH and CLAUDE MEADOW,
Petitioners

v.

JOHN BRIGGS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the court of appeals (App. A, pp. 1a-19a) is reported at 569 F.2d 1. The memorandum opinion and order of the district court (App. B, pp. 20a-24a) is reported at 384 F.Supp. 1228. A corrective order of the district court and order of final judgment (App. C, pp. 25a-27a) are unreported.

Jurisdiction

The judgment of the court of appeals (App. D, p. 28a) was entered on September 21, 1977. A timely petition for rehearing with a suggestion for rehearing *en banc* was **denied on December 1, 1977 (Apps. E and F, pp. 29a-30a). On February 23, 1978 petitioners' time to file this petition** was extended until April 30, 1978 (App. G, p. 31a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1354(1).

Questions Presented

1. Whether Section 2 of the Mandamus and Venue Act of 1962 grants the United States district courts nationwide personal jurisdiction over federal officials sued for damages in their private individual capacities for acts allegedly performed under color of law.

2. Whether such a grant of personal jurisdiction violates the due process clause of the fifth amendment.

Statute and Constitutional Provisions Involved

The statute involved is Section 2 of the Mandamus and Venue Act of 1962, 28 U.S.C. § 1391(e):[1]

> "A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a

1. The statute was amended by Act of Oct. 21, 1976, Pub. L. No. 94-574 §2, 90 Stat. 2721-2722. The amendment does not bear on the questions presented.

> defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

The constitutional provision involved is the fifth amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement

Respondents, individuals who were subpoened to testify before a grand jury in the Northern District of Florida in July, 1972, brought this suit seeking damages for alleged violations of their constitutional rights. Six of the Respondents were indicted by that grand jury.

Petitioners, all residents of Florida, are William H. Stafford, Jr., then United States Attorney for the Northern District of Florida (now United States District Judge for

the Northern District of Florida), Stuart J. Carrouth, then Assistant United States Attorney for the Northern District of Florida (now in private law practice in Florida), and Claude Meadow, a Special Agent for the Federal Bureau of Investigation assigned to duty in Florida.

Respondents claim that petitioners, while participating in the grand jury proceeding, knew of false testimony given before the District Judge in Florida by defendant below Guy Goodwin, an attorney with the Department of Justice. Mr. Goodwin is alleged to have falsely testified that there were no government informants among the grand jury witnesses who were represented by counsel. Respondents' complaint alleges, *inter alia,* that petitioners violated respondents' first, fourth, fifth, sixth, eighth, and ninth amendment rights by permitting such false testimony; that the grand jury would not have indicted the six respondents if it knew of the false testimony; and that the concealed presence of a government informant in the "defense camp" deprived respondents of sixth amendment rights. Respondents each seek $100,000 punitive and $50,000 compensatory damages from petitioners in their private individual capacities. Jurisdiction was based upon 28 U.S.C. §§ 1331, 1332, 1343, 1651, 2201 and 2202. Respondents served their summons and complaint upon petitioners by certified mail in Florida.

The district court granted petitioners' motion to dismiss the complaint for want of personal jurisdiction, improper venue and insufficiency of service of process. The court of appeals reversed and denied petitioners' motion for rehearing. It held that petitioners were subject to personal jurisdiction in the district court, notwithstanding their lack of "presence" in or "minimum contacts" with the District of Columbia, merely because petitioners were served with process in the manner specified in Title 28, Section 1391(e).

Reasons for Granting the Writ

The Court of Appeals has Decided an Important Federal Jurisdictional Question Which Should be Settled by This Court Without Delay

The court of appeals held that Title 28, Section 1391(e) provides more than a mechanism for service of process; it subjects federal officials sued in their private individual capacities for damages alleged to arise from official conduct to unlimited nationwide personal jurisdiction, notwithstanding the absence of any nexus between the official or the alleged wrong and the chosen forum. This is the most radical departure to date from the standards governing personal jurisdiction established by Congress and this Court. *See infra* at 14, n. 9.

The impact of this decision is heightened when viewed against developments, subsequent to the enactment of Section 1391(e), which have increased the number and broadened the scope of damage suits against federal officials in their private individual capacities.

When the Mandamus and Venue Act of 1962 was enacted, such suits were not brought in the federal courts for two reasons. First, federal officials were held absolutely immune from suit in personal damage actions grounded in their official conduct. *E.g., Barr* v. *Matteo,* 360 U.S. 564 (1959). Second, there was then no federal analogue to 42 U.S.C. § 1983, which imposes damage liability upon those who, under color of state law, deprive persons of federal rights. Thus, in 1963 this Court said in *Wheeldin* v. *Wheeler,* 373 U.S. 647:

> "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law.*** Federal law, however, supplies the defense,

> if the conduct complained of was done pursuant to a federally imposed duty*** or immunity from suit. *** Congress could, of course, provide otherwise, but it has not done so. Over the years Congress has considered the problem of state civil and criminal actions against federal officials many times. *** But no general statute making federal officers liable for acts committed 'under color,' but in violation, of their federal authority has been passed." *Id.* at 652.

At that time suits in the federal courts were brought against federal officials in their official capacities or, in a limited category of cases where the relief sought was in essence against the United States, nominally in their personal capacities for actions taken under color of law. As the House Judiciary Committee Report on the Mandamus and Venue Act of 1962 explained, the latter category comprised:

> "cases where the action is *nominally* brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also *in essence against the United States* but are brought against the officer or employee as individual only to circumvent what remains of the doctrine of sovereign immunity." H.R. Rep. No. 536, 87th Cong., 1st Sess. at 4. *See* S. Rep. No. 1992, 87th Cong., 2d Sess., at 3 (hereinafter "H. R. Rep." and "S. Rep."). [Emphasis added.]

See also Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). While some of these cases sought damages, any award would be paid from the United States Treasury.[2] These are the suits for money judgments—

2. *E.g., Roberts* v. *United States,* 176 U.S. 221 (1900); *Kendall* v. *United States,* 37 U.S. (12 Pet.) 524 (1838); *Clackamas County* v. *McKay,* 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot,* 349 U.S. 909 (1955).

"nominally" against the individual and "in essence against the United States"—which were considered by Congress when it enacted Section 1391(e).

After the enactment of Section 1391(e), this Court held in *Bivens* v. *Six Unknown Agents,* 403 U.S. 388 (1971), that violations of the fourth amendment give rise to damage actions against federal officials in their private individual capacities. Furthermore, the absolute immunity doctrine has been eroded in the lower federal courts. *See, e.g., Economou* v. *Butz,* 535 F.2d 688 (2 Cir. 1976), *cert. granted,* Dkt. No. 76-709. These developments set the framework for the suit below.

The court of appeals' holding that Section 1391(e) applies to suits against federal officials in their private individual capacities cannot be squared with the fact that when Congress enacted the statute, these developments had not yet occurred and this type of suit could not then be maintained in the federal courts.

There is nothing unusual about subjecting federal officials to nationwide personal jurisdiction in the suits described in the House and Senate Committee Reports. Nationwide jurisdiction over officials sued in their official capacities ordinarily exists by reason of nationwide "official presence" through the "hierarchy of command" and has nothing to do with the Mandamus and Venue Act of 1962. *E.g., Strait* v. *Laird,* 406 U.S. 341, 345 (1972). Section 1391(e) merely provides a mechanism for service of process, otherwise unavailable, to effect such personal jurisdiction. *E.g., Martinez* v. *Seaton,* 285 F.2d 587, 589 (10 Cir. 1961).

If Section 1391(e), by its own force, confers nationwide jurisdiction over officials sued for damages in their private individual capacities, the consequences for federal officials are extreme. Federal officials, unlike others, will be forced to defend their personal assets in jurisdictions with which

they have no contact and far from their homes. Opening so wide a door to federal litigation against officials in inconvenient forums by anyone who feels aggrieved by official conduct is readily subject to abuse. Indeed, since *Bivens* a rash of such actions has arisen in which personal jurisdiction is sought to be predicated solely upon the service provision in Section 1391(e). *See infra* at 12-13; *see also* P. Bator, *et al., Hart and Wechsler's The Federal Courts And The Federal System* (2d ed.) (Supp. 1977) at 227.

The difficulties faced by officials performing their duties under the threat that they may be forced to bear the burden of defending their actions in court have long been recognized. *Barr* v. *Matteo, supra* at 571. These burdens can be devastating where the official must personally defend himself in distant forums.

The Committee Reports accompanying Section 1391(e) stated that in actions covered by this statute:

> "The government official is defended by the Department of Justice whether the action is brought in the District of Columbia or in any other district. U.S. Attorneys are present in every judicial district. Requiring the government to defend Government officials and agencies in places other than Washington would not appear to be a burdensome imposition." H.R. Rep. at 3; S. Rep. at 3.

But when an official is sued for damages in his private individual capacity, and not nominally, this is not the case. Only in limited instances can the Department of Justice represent the official or retain private counsel on his behalf. 28 C.F.R. §§ 15.2, 15.3. Otherwise, the burden of defense far from home is more than a federal employee can fairly be expected to withstand. There is no indication that Congress intended the choice of public service as a career to exact such a cost.

In *Robertson* v. *Railway Labor Board,* 268 U.S. 619, 624, 627 (1925), this Court cautioned that exceptions to the general rules of personal jurisdiction must be clearly expressed by Congress and are not lightly to be assumed.[3] Neither the language nor the history of Section 1391(e) contains an expression of congressional intent that this statute have the far-reaching consequences permitted by the court below.

The Court of Appeals has Decided an Important Federal Jurisdictional Question in Conflict With Decisions of the Courts of Appeals for the Second and Ninth Circuits

The decision below conflicts with prior decisions of the courts of appeals for the Second and Ninth Circuits which held that (1) the service of process provision in Section 1391(e) cannot, standing alone, supply personal jurisdiction over federal officials not otherwise amenable to suit; and (2) Section 1391(e) is limited to suits which, prior to its enactment, could have been brought only in the District of Columbia.

1. In *United States ex rel. Rudick* v. *Laird,* 412 F.2d 16 (2 Cir.), *cert. denied,* 396 U.S. 918 (1969), a habeas corpus case, the court held that Section 1391(e) "is a venue provision as its title clearly specifies," *id.* at 20, and accordingly, its service of process provision could not, standing alone, provide personal jurisdiction for fundamental reasons. Judge Moore explained:

> "The concepts of personal jurisdiction and venue are closely related but nonetheless distinct. * * * Thus

3. In *Robertson* this Court interpreted a statute permitting suit in "any District Court of the United States" as meaning any court having personal jurisdiction under general rules then prevailing.

> venue deals with the question of which court, or courts, of those which possess adequate personal • • • jurisdiction, may hear the specific matter in question. In short, jurisdiction must first be found over • • • the persons involved in the cause before the question of venue can properly be reached.
>
> Therefore, in relation to Section 1391(e), that provision can be said to authorize suit in the Southern District of New York in the instant case if, but only if, the jurisdiction—personal and subject matter—otherwise exists." *Id.* at 20.

Rudick was cited by this Court to support its holding in *Schlanger* v. *Seamans,* 401 U.S. 487, 491 (1971).[4]

In *Marsh* v. *Kitchen,* 480 F.2d 1270 (2 Cir. 1973), the Second Circuit examined *sua sponte* whether any federal statute or rule conferred personal jurisdiction in a case similar to this. It said:

> "We have not found any federal statute or procedural rule which, either expressly or upon proper interpretation, authorizes extraterritorial service of process under the circumstances of this case." *Id.* at 1273 n. 8.

In *Smith* v. *Campbell,* 450 F.2d 829 (9 Cir. 1971), the Ninth Circuit held that "Section 1391 may not be utilized to confer jurisdiction, but can be in order to effectuate juris-

4. The *Rudick* holding is not limited to habeas corpus cases on the theory that 28 U.S.C. § 2241(a) is an exception to Section 1391(e). The habeas corpus statute empowers a court to issue the writ within its "jurisdiction," that is, against officials with requisite "presence." *Strait* v. *Laird, supra* at 345 n.2; *Braden* v. *30th Judicial Circuit Court,* 410 U.S. 484, 495 (1973). *Rudick* has been followed in the district courts in cases not involving habeas corpus. *E.g., Bertoli* v. *The Securities and Exchange Commission,* 77 Civ. 1450 (S.D.N.Y. 1/4/77). (App. H. p. 32a-36a); *Kipperman* v. *McCone,* 422 F. Supp. 860, 871 (N.D. Cal. 1976).

diction once it has attached." *Id.* at 834. *Powers* v. *Mitchell,* 463 F.2d 212 (9 Cir. 1972), similarly held that Section 1391(e), which also "extends jurisdiction to 'agencies,' does not allow a federal court to extend its jurisdiction to a local federal agency such as a selective service board which is not within the court's territorial jurisdiction." *Id.* at 213.

Under the principles established in the Second and Ninth Circuits, Section 1391(e) cannot vest a court in the District of Columbia with personal jurisdiction over petitioners here, who were federal officials stationed in Florida and who were not in any sense "present" in the District of Columbia. Section 1391(e) provides only for the manner of service; it is not an independent basis for personal jurisdiction.[5]

2. In *Natural Resources Defense Council* v. *TVA,* 459 F.2d 255 (2 Cir. 1972), the Second Circuit reviewed the legislative history of Section 1391(e), and held that it was inapplicable to a suit against the TVA and its officers. The court determined that Congress intended Section 1391(e) to apply to suits which could have been brought "with assurance only in the District of Columbia."[6] *Id.* at 259. *Accord, Liberation News Service* v. *Eastland,* 426 F.2d 1379, 1383-84 (2 Cir. 1970); *Sigler* v. *Levan,* No. 77-CA-35

5. Similarly, local statutes governing the manner of service do not provide independent bases for personal jurisdiction. *Compare* D.C. Code § 13-431 *with* D.C. Code § 13-423, where Congress recognized this fundamental distinction. *See Petrol Shipping Corp.* v. *Kingdom of Greece,* 360 F.2d 103, 109 (2 Cir.), *cert. denied,* 384 U.S. 931 (1966); 4 C. Wright & A. Miller, *Federal Practice and Procedure* at 205-206 (1969).

6. Indeed, the one time this Court discussed Section 1391(e), it said: "That section was enacted to broaden venue of civil actions which could previously have been brought only in the District of Columbia. *See* H.R. Rep. No. 536, 87th Cong., 1st Sess. 1; S. Rep. No. 1992, 87th Cong., 2d Sess., 2." *Schlanger* v. *Seamans, supra,* at 490 n. 4.

(W.D. Tex. 3/22/78) (App. I, pp. 37a-49a); *Rimar* v. *McCowan*, 374 F. Supp. 1179 (E.D. Mich. 1974).

In the *TVA* case, Judge Friendly observed that Section 1391(e) cannot be treated simply

> "as a text to be parsed with such aid as the dictionary and grammar afford and without adequately considering the history of the statute and the evil it was designed to cure." 459 F.2d at 257.

Because of an historical anomaly, the District Court for the District of Columbia was the only federal district court with jurisdiction to issue writs of mandamus. This, coupled with the requirement that department heads, often indispensible parties in mandamus actions, be served at the seat of government, limited venue to the District of Columbia. The Mandamus and Venue Act of 1962 contained two sections. Section 1, now codified as 28 U.S.C. § 1361, cured the first problem by granting all district courts jurisdiction to issue writs in the nature of mandamus. Section 2, now Section 1391(e), permitted service of process outside the District of Columbia upon officials who were previously amenable to service only in the District of Columbia. *Id.* at 258 n.6. It is submitted that Section 1391(e) was intended to do no more.

The rule in the District of Columbia Circuit now conflicts with the Second Circuit rule because, prior to the enactment of Section 1391(e), petitioners could have been sued in their private individual capacities wherever they could be found. They were not amenable to suit only in the District of Columbia. *Compare Nesbitt Fruit Products, Inc.* v. *Wallace*, 17 F. Supp. 141, 143 (S.D. Iowa 1936) *with Martinez* v. *Seaton, supra* at 589.

3. There are at least 17 suits in which the questions presented here are now being litigated.[7] Among these cases

7. App. J, p. 50a.

is *Driver* v. *Helms*, 74 F.R.D. 382 (D.R.I. 1977), now *sub judice* in the First Circuit (No. 77-1482).[8] Resolution of these issues now will aid the proper administration of justice.

The Court of Appeals has Decided an Important Constitutional Issue Which Should be Settled by This Court

The court of appeals held its interpretation of Section 1391(e) was not precluded by the due process clause of the fifth amendment, postulating that there are no limits upon the power of Congress under article III to define the jurisdictional reach of the federal courts. We submit that this article III power is limited by "traditional notions of fair play and substantial justice" similar to the limitations imposed by the due process clause of the fourteenth amendment upon the exercise of personal jurisdiction by the state courts. *E.g., International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

This issue, reserved in *United States* v. *Scophony Corp.*, 333 U.S. 795, 804 n.13, 818 (1948), has not been presented since *International Shoe* because, putting aside Section 1391(e), no federal law provides for personal jurisdiction in circumstances repugnant to fair play and substantial justice. As the court below observed (App. A, p. 17a, n.73), Congress has indeed provided for nationwide service of process in "a few clearly expressed and carefully guarded

8. The appellants in *Driver* include 25 federal officials of high office. The facts in *Driver* graphically illustrate the vexatious consequences of the decision below. Most of the defendants there were simultaneously sued in their private capacities in New York, San Francisco, Providence and the District of Columbia based, in part, upon the same allegations of unlawful mail opening. *Grove Press, Inc.* v. *C.I.A.* 76 Civ. 5509 (S.D.N.Y.); *Kipperman* v. *McCone, supra*; *Driver* v. *Helms, supra*: *Halkin* v. *Helms*, Civil No. 75-1773 (D.D.C.). The *Kipperman, Driver* and *Halkin* cases were brought as class actions.

exceptions to the general rule of jurisdiction *in personam.*" *Robertson* v. *Railway Labor Bd., supra* at 624. However, each such statute is carefully guarded by a protective mechanism, such as a restricted venue provision limiting available forums, which insures fairness to the defendants.[9]

The court of appeals reached its decision by theorizing that Congress could have created only one federal court, which as a practical necessity would have required nationwide service "clearly consonant with the Constitution." App. A, p. 16a. *See also Hart & Wechsler's The Federal Courts and The Federal System, supra* at 1106 *et seq.* This theory is flawed because it fails to recognize that while Congress' power to create inferior federal courts under article III may be permissive—"such inferior Courts as the Congress may . . . establish," the mandate of fifth amendment due process is absolute and limits the exercise of congressional power.[10] The question is not what Congress might have done in 1789, but whether it can now enact a statute repugnant to contemporary notions of fair play and substantial justice.

Rather than coming to grips with this issue, the court below merely begged the question. Since congressional power is limited by the due process clause, Congress could establish the single court hypothesized only if unlimited nationwide jurisdiction is constitutional. The claim that such a court might exist merely restates, but does not resolve, the issue presented.

The court of appeals rejected what it termed "apodictical" assertions of the Third and Fifth Circuits that personal

9. App. K, p. 51a sets forth the federal "nationwide service" statutes and indicates the manner in which they are restricted so as not to offend traditional notions of fair play and substantial justice.

10. For example, surely Congress could not justify the creation of standards of amenability to suit based on race by exercising its "plenary power" under article III.

jurisdiction in the federal courts is governed by a "fairness standard." App. A, p. 17a-18a n. 74. It distinguished the fairness limitations on state long-arm jurisdiction because such jurisdiction reaches beyond state territorial limits. In the federal sphere, it deemed "fairness considerations" inapplicable because jurisdiction does not reach beyond the territory of the United States. *Accord, Moriash* v. *Morrill,* 496 F.2d 1138 (2 Cir. 1974), decided before *Shaffer* v. *Heitner,* 433 U.S. 186 (1977). *Compare Oxford First Corp.* v. *PNC Liquidating Corp.,* 372 F.Supp. 191 (E.D. Pa. 1974).

By rejecting fairness considerations because the petitioners were summoned within the United States, the court of appeals failed to recognize that *Shaffer* v. *Heitner* completely repudiated the rigid jurisdictional underpinning —territorial sovereignty—of *Pennoyer* v. *Neff,* 95 U.S. 714 (1877). *Shaffer* recognized that "the theory that territorial power is both essential to and sufficient for jurisdiction has been undermined. . . ." 433 U.S. at 221. There, this Court held that although a court may have the necessary territorial power, the exercise of that power must be limited by traditional notions of fair play and substantial justice. The rationale of *Shaffer* should be applicable to questions of federal as well as state *in personam* jurisdiction.

The decision below might have been correct under the theory of *Pennoyer;* however, it cannot withstand analysis under *Shaffer. Shaffer* recognized fair play as the crucial element in the due process equation, sufficient to outweigh antiquated notions of the supremacy of territorial power.

Congress surely has territorial power over petitioners. However, only this Court can authoritatively decide whether the exercise of that power, as enunciated by the court of appeals' construction of Section 1391(e), is subject to fifth amendment due process limitations and whether these limitations require that fair play and substantial justice be afforded to petitioners.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: April 30, 1978

Respectfully submitted,

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APPENDIX A

JOHN BRIGGS ET AL., *Appellants,*

v.

GUY GOODWIN, INDIVIDUALLY AND AS ATTORNEY FOR THE DEPARTMENT OF JUSTICE, ET AL. [STAFFORD, ET AL.]

No. 75-1578.

UNITED STATES COURT OF APPEALS
District of Columbia Circuit.

Argued April 13, 1976.

Decided Sept. 21, 1977.

As amended Dec. 1, 1977.

Rehearing Denied Dec. 1, 1977.

• • •

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 74-803).

Doris Peterson, New York City, with whom Nancy Stearns, Morton Stavis, New York City, and Philip J. Hirschkop, Alexandria, Va., were on the brief, for appellants.

R. John Seibert, Atty., Dept. of Justice, Washington, D. C., with whom Robert L. Keuch and Benjamin C. Flannagan, IV, Attys., Dept. of Justice, Washington, D. C., were on the brief, for appellees. George W. Calhoun, Atty., Dept. of Justice, Washington, D. C., also entered an appearance for appellees.

Before MCGOWAN, ROBINSON and WILKEY, Circuit Judges.

Opinion for the Court filed by SPOTTSWOOD W. ROBINSON, III, Circuit Judge.

SPOTTSWOOD W. ROBINSON, III Circuit Judge:

During the summer of 1972, Guy Goodwin, an attorney in the Department of Justice, together with United States Attorney William H. Stafford, Jr.[1] and Assistant United States Attorney Stuart J. Carrouth for the Northern District of Florida, conducted therein grand jury proceedings at which appellants,[2] among others, were subpoenaed to appear. On motion by newly-retained counsel for appellants,[3] the District Judge responsible for those proceedings called Goodwin to the witness stand and inquired as to whether any of the "witnesses represented by counsel [were]agents or informants" of the Government.[4] Goodwin's sworn answer—"[n]o, Your Honor"[5]—is alleged to have been a knowing falsehood,[6] and its consequences to

1. Now United States District Judge for the Northern District of Florida.

2. Appellants were all members of the Vietnam Veterans Against the War/Winter Soldier Organization. Compare Brief for Appellees at 3 n. 1 with appellant's complaint ¶¶ 4-7, Appellants' Appendix (App.) 6-7.

3. According to the complaint, ¶¶ 10-12, App. 8-9, some of the subpoenas were returnable on the third succeeding day, and most of them compelled appearance at the same time; the witnesses summoned were as far away as Texas; and "[n]early all of the lawyers met their clients for the first time" only days before they were to appear. *Cf.* App. 20.

4. App. 27.

5. The transcript indicates, App. 20-23, that a list of the witnesses represented by counsel was read to the three prosecutors in open court and, on the following day, Goodwin was sworn, asked by the judge only the above question and excused without examination by any of the counsel. App. 27.

6. Complaint ¶¶17-18, App. 10. One of the witnesses is alleged to have been a paid informant and to have given to the Government information secured in the course of meetings with appellants and their counsel. Complaint ¶¶ 26-30, App. 12-13.

have been violative of various of appellants' constitutional rights.[7]

For redress of those consequences, appellants sued the three prosecutors and Claude Meadow, an agent of the Federal Bureau of Investigation,[8] "individually and in their official capacities"[9] in the District Court here. Each appellant sought a declaratory judgment, $50,000 in compensatory damages and a punitive award of $100,000.[10] Goodwin, whose official residence was then in the District of Columbia,[11] was served personally and the others, each of whom resided in Florida, were served by certified mail.[12] The Florida defendants seasonably requested transfer of the litigation to the Northern District of Florida[13] or, alternatively, dismissal for improper venue and insufficiency of process.[14] The District Court denied the former

7. Complaint ¶ 3, App. 6. Several violations of criminal statutes are also asserted and appellants, invoking 42 U.S.C. § 1985 (1970), charge that these violations were the result of a conspiracy to violate their civil rights. Complaint ¶ 34, App. 15.

8. Meadow was the alleged conduit between the informant and the other appellees. Complaint ¶ 27, App. 12.

9. Complaint ¶ 7, App. 7.

10. Complaint, App. 16.

11. The District Court so found. *Briggs* v. *Goodwin*, D.D.C., 384 F.Supp. 1228 (memorandum and order Nov. 20, 1974), App. 38. Appellees do not contest that finding. See Brief for Appellees at 3, 4 n. 2.

12. See notes 54-75 *infra* and accompanying text.

13. See 28 U.S.C. § 1404(a) (1970).

14. At the same time, Goodwin moved for dismissal on grounds of immunity both as a prosecutor and as a witness, but his motion was denied. See *Briggs* v. *Goodwin*, *supra* note 11, (memorandum and order Nov. 20, 1974), App. 35-37, *aff'd*,—U.S.App.D.C.—, 569 F.2d 1 (1977). Goodwin is not a party to this appeal.

motion but granted the latter,[15] and the question on appeal is whether this action may be entertained in the District of Columbia. We hold that it may.

15. The court rejected the motion to transfer on the grounds that venue in the District of Columbia was proper, adverting to "well established law that a plaintiff's choice of venue is given preference . . . ." *Briggs* v. *Goodwin, supra* note 11, (memorandum and order Nov. 20, 1974) (unreported), App. 38. On March 4, 1975, the court, repudiating that premise, issued the following additional order:

> Upon consideration of the Alternative Motion of Defendants Stafford, Carrouth and Meadow to Dismiss this Action as to them for Lack of Jurisdiction over their Persons, Improper Venue, Insufficiency of Process and Insufficiency of Service of Process, the memoranda of points and authorities in support thereof and in opposition thereto, it appearing to the Court that service of process upon said defendants was made by certified mail; that the Complaint fails to allege the defendants transacted any business in the District of Columbia or caused tortious injury to plaintiffs in the District of Columbia by an act or omission therein as required by District of Columbia Code § 13-423(a); that the action against said defendants could not have been brought in this Court prior to the enactment of 28 U.S.C. § 1391(e) and is not one in essence against the United States as required by § 1391(e); and that by reason thereof the Court lacks venue and *in personam* jurisdiction with respect to defendants Stafford, Carrouth and Meadow, service of process on them was insufficient, and the action as to these defendants should be dismissed, it is, therefore, by the Court this 4th day of March 1975:
>
> ORDERED that the Alternative Motion of Defendants Stafford, Carrouth and Meadow to dismiss this action be, and and the same hereby is, granted; and it is further
>
> ORDERED that this action be, and the same hereby is, dismissed as to defendants William H. Stafford, Jr., Stuart J. Carrouth, and Claude Meadow.

Briggs v. *Goodwin, supra* note 11, (order Mar. 4, 1975) (unreported), App. 39-40.

Whatever the merits of the venue determination, one must wonder why the District Court did not hold the motion for transfer in abeyance until it had decided whether the litigation could continue in the District. See *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, 466-467, 82 S.Ct. 913, 915-916, 8 L.Ed.2d 39, 42 (1962) (transfer may be effected even absent personal jurisdiction over all parties in the transferor court, and in most cases is preferable to dismissal if the defect in venue can thereby be cured).

I

The propriety of venue in the District of Columbia is measured by 28 U.S.C. § 1391(e),[16] which in pertinent part provides:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, . . . may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides . . . .
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

This litigation, against four federal officials, was commenced in the district wherein one of them officially resided.[17] The complaint alleges constitutional depredations wrought by activities "in [their] official capacity or under color of legal authority."[18] The suit thus fits within the ostensible coverage of Section 1391(e). Appellees suggest a gloss upon the statutory language, however, excepting from its purview any case in which a money judgment may be returned against a federal officer, and to this suggestion the District Court apparently acceded.[19] Our exam-

16. 28 U.S.C. § 1391(e) (1970), as amended by Act of Oct. 21, 1976, Pub.L. No. 94-574 § 2, 90 Stat. 2721-2722. The 1976 amendment does not bear on the questions in this case.

17. See note 11 *supra*.

18. See text *supra* following note 16.

19. *Briggs* v. *Goodwin, supra* note 11, (order of March 4, 1975), reproduced at note 15 *supra*.

ination of the genealogy of the "Congressional English"[20] just set forth leads us to decline appellees' invitation.

The progenitor of Section 1391(e) was H.R. 10089,[21] a bill "[t]o permit a civil action . . . against an officer of the United States *in his official capacity* . . . in any judicial district . . . where a plaintiff in the action resides."[22] Asked for comments on the bill, the Department of Justice expressed reservations about its utility.[23] It explained that most suits against public officials, such as those seeking "damages from him personally for actions taken ostensibly in the course of his official duty but which the plaintiff claims are in excess of his official authority," were "against [him] in his individual capacity,"[24] and therefore outside the scope of the proposed legislation. On the other hand, the Department continued, any litigation "against a Government official . . . in his official capacity would be the equivalent of a writ of mandamus"[25] which, by virtue of a historical anomaly, no federal court outside the District of

20. *See Henderson* v. *Flemming,* 283 F.2d 882, 885 (5th Cir. 1960).

21. H.R. 10089, 86th Cong., 2d Sess. (1960).

22. H.R. 10089, 86th Cong., 2d Sess. (preamble) (1960) (emphasis added). This bill was in all pertinent respects identical to H.R. 10892, 85th Cong., 2d Sess. (1958), upon which no action was taken beyond referreal to committee. H.R. 10089 proposed that the following language be codified as 28 U.S.C. § 1391(e):

> A civil action in which each defendant is an officer of the United States in his official capacity, a person acting under him, or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides.

23. H.R. Rep. No. 1936, 86th Cong., 2d Sess. 6 (1960) (letter of Deputy Attorney General Lawrence Walsh).

24. *Id.*

25. *Id.*

Columbia could then issue.[26] Since H.R. 10089 would have conferred no mandamus jurisdiction and would not have applied to actions against officials "individually," the Department doubted whether its enactment "would serve any useful purpose."[27]

H.R. 12622[28] was drafted to meet these and other[29] criticisms. Its first section extended mandamus jurisdiction to all of the federal district courts.[30] Its second section broadened the prior venue proposal to include suits directed at a federal official's activity whether characterized as occurring "in his official capacity" or "under color of legal authority."[31] The purpose of the new bill was "to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government,[32] but who would previously have been compelled[33] to sue in the Dis-

26. Compare *M'Intire* v. *Wood,* 11 U.S. (7 Cranch.) 504, 3 L.Ed. 420 (1813), with *Kendall* v. *United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1838).

27. H.R. Rep. No. 1936, *supra* note 23, at 6.

28. H.R. 12622, 86th Cong., 2d Sess. § 2 (1960), in *id.* at 9.

29. The Judcial Conference of the United States proposed additions that subsequently were adopted as 28 U.S.C. §§ 1391(e)(1), (2), (3) (1970). *Id.* at 5 (letter of Warren Olney, III, Director, Administrative Office of the United States Courts). Appellants rely only on subsection (e)(1), quoted in text following note 15 *supra.*

30. This grant was the prototype for what is now 28 U.S.C. § 1361 (1970), enacted along with § 1391(e).

31. H.R. 12622, *supra* note 28, set forth in H.R. Rep.No.1936, *supra* note 23, at 9.

32. H.R.Rep.No.1936, *supra* note 23, at 3.

33. The House Report on H.R. 12622 focused on the time and expense involved in traveling to the District of Columbia to institute suit against officials or agencies located there, and the possibility that litigation commenced against agents in the field might be dismissed for want of venue over an indispensable superior located in Washington. H.R.Rep.No.1936, *supra* note 23, at 2-3.

trict of Columbia by the pre-existing venue provisions, which were deemed "contrary to the sound and equitable administration of justice."[34] And the House Report specifically noted that "[t]he venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty."[35]

The House passed H.R. 12622[36] but the Senate adjourned before any action was taken on it. So, in the next Congress, it was reintroduced as H.R. 1960,[37] comments were again solicited, and again the Department of Justice asked that portions of the bill be "clarified."[38] Some proffered clarifications were adopted,[39] but notably the Department's suggestion that the venue provision be changed to "eliminate[] suits for money judgments against officers"[40] was not.

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34. *Id.* at 3.

35. *Id.*

36. 106 Cong.Rec. 18405 (1960). *Cf.* H.R.Rep. No.536, 87th Cong., 1st Sess. 1 (1961).

37. H.R. 1960, 87th Cong., 1st Sess. (1961), 107 Cong.Rec. 12157 (1961); H.R.Rep.No.536, *supra* note 36, at 5-6. See *id.* at 1 ("[a]n identical bill, H.R. 12622, passed the House in the closing days of the 86th Congress but was not acted upon by the Senate").

38. S.Rep.No.1992, 87th Cong., 2d Sess. 6 (1962) (letter of Assistant Attorney General (now Justice) Byron R. White), U.S. Code Cong. & Admin.News 1962, p. 2784.

39. Compare *id.* at 1 with *id.* at 6-7. The Senate passed the bill as amended without revealing debate. 108 Cong.Rec. 18783-18784 (1962). The House passed the Senate version with one change, also responsive to the Justice Department's suggestions, 108 Cong.Rec. 20093-20094 (1962), and the Senate acquiesced. *Id.* at 20079. *Cf. Peoples* v. *United States Dep't of Agriculture*, 138 U.S.App.D.C. 291, 295 n. 9, 427 F.2d 561, 565 n. 9 (1970) (noting the importance of the selective adoption of the Department's proposed revisions).

40. S.Rep.No.1992, *supra* note 38, at 6, U.S. Code Cong. & Admin.News 1962, p. 2789.

Rather, both the House and Senate committees rejoined with the observation that the "venue problem" which the bill sought to rectify was as troublesome in damage suits against officials as in other sorts of civil litigation.[41]

This colloquy between the Department of Justice and the legislative draftsmen demonstrates the legislature's comprehension and resolution of the issue before us. The conscious addition by Congress of language designed to extend Section 1391(e) to suits for damages against federal officials acting under color of legal authority, coupled with its adherence to that language despite highly respectable protest,[42] manifests beyond peradventure an intent to broaden venue in just such suits. Our duty is to harken to the will of Congress as expressed, and the statutory mandate is clear.

We realize, of course, that other courts have entertained divergent views on the relation of Section 1391(e) to damage actions against federal officials.[43] We acknowledge

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41. *Id.* at 3; H.R.Rep.No. 536, *supra* note 36, at 3.

42. See note 39 *supra*.

43. The Fifth Circuit, in *Ellingburg* v. *Connett*, 457 F.2d 240, 241 (5th Cir. 1972), held that "Section 1391(e)(4) . . . may be a basis for venue" in a civil rights action "for damages and injunctive relief against officers . . . of the United States," and remanded for a determination as to whether the factual predicate—the plaintiff's residence in the district—could be satisfied. The dissent apparently agreed that an action for damages might normally be brought pursuant to its provisions, but regarded the damage claim there advanced as a sham. *Id.* at 242. See *Driver* v. *Helms*, 74 F.R.D. 382 (D.R.I. 1977). The District Court in this circuit has reached a similar result in a case involving alleged injury "as a result of defendants' fraudulent and defamatory statements, made in the course of their official duties," so long as federal employment continued to the time the action was filed. *Wu* v. *Keeney*, 384 F.Supp. 1161, 1168 (D.D.C. 1974). *Cf. Benson* v. *United States*, 421 F.2d 515, 517 (9th Cir.), *cert. denied*, 398 U.S. 943, 90 S.Ct. 1861, 26 L.Ed.2d 279 (1970) (semble); *Thompson* v. *Kleppe*, 424 F.Supp. 1263, 1266 (D.Haw. 1976) (semble). See also *Kletschka* v. *Driver*, 411 F.2d 436, 442 (2d

also that in *Relf* v. *Gasch*[44] we spoke to the subject in a manner that, in retrospect, seems susceptible of conflicting interpretation, but *Relf* does not clash with the result reached here. That case involved the propriety of a transfer of litigation to another district "for the convenience of parties . . . [and] in the interest of justice,"[45] and the complaint hinted that some defendants might be subject to liability not only for activities under color of legal authority but also for others of a purely personal character.[46]

Cir. 1969) (dicta); *Rabiolo* v. *Weinstein*, 357 F.2d 167, 168 (7th Cir. 1966) (dicta). On the other hand, *Paley* v. *Wolk*, 262 F.Supp. 640, 642-643 (N.D.Ill.1965), *cert. denied*, 386 U.S. 963, 87 S. Ct. 1031, 18 L.Ed.2d 112 (1967) found § 1391(e) unavailable to a plaintiff apparently alleging that certain employees of the Patent Office had taken money from him on false pretenses, since "the action would be against the defendants personally rather than in their official capacities," as did *Davis* v. *Federal Deposit Ins. Co.*, 369 F.Supp. 277, 279 (D.Colo. 1974), where damages were sought from an FDIC employee on grounds his negligence had facilitated the collapse of a national bank. Compare with these cases *Griffith* v. *Nixon*, 518 F.2d 1195, 1196 (2d Cir.), *cert. denied*, 423 U.S. 995, 96 S.Ct. 422, 46 L.Ed.2d 369 (1975), and *Green* v. *Laird*, 357 F.Supp. 227, 230 (N.D.Ill.1973), each seemingly concluding that *venue* under § 1391(e) was proper but that that section did not affect service requirements, which were deemed unmet, a matter discussed *infra* at note 58. Perhaps *Paley* and *Davis* may be reconciled with *Wu* and *Ellingburg*, for from the reports in the former cases it is unclear whether the injurious action was alleged to have been taken under color of legal authority, and for aught that appears the courts may implicitly have found the activity to have been purely personal. *Cf. Griffith* v. *Nixon*, *supra*, 518 F.2d at 1196.

44. 167 U.S.App.D.C. 238, 511 F.2d 804 (1975).

45. 28 U.S.C. § 1404(a) (1970).

46. 167 U.S.App.D.C. at 240, 511 F.2d at 806. The plaintiffs in *Relf*, all minors, alleged that they were sterilized without their consent or the consent of their parents. They sued the United States—under the Federal Tort Claims Act, 28 U.S.C. § 1346(a) *et seq.* (1970)—and a group of individual defendants, all of whom were at one time federal officers or employees. *Id.* To be sure, each of the nine counts of the plaintiffs' complaint ceremoniously asserted that the individual defendants had acted within the scope of their offices

Those possibilities could not have been explored in the transferee district, for neither Section 1391(e) nor any other provision gave venue there,[47] and as a prerequisite to transfer "[v]enue must be proper in the transferee district"[48] for every defendant and on ever claim for relief.[49] Moreover, a transfer is conditioned as well on the amenability of all defendants "to the process of the federal court in the transferee district at the time the action was originally filed"[50] and, apart from the inefficacy of process available in that district for any defendant sued only in a purely personal role,[51] the fact that some defendants had left federal service prior to institution of suit "increase[d] the likelihood" that they were not subject to process emanating from the transferee court.[52] Consequently we remanded the case in order that the District Court might, by allowing amendments to the complaint, be afforded a reasonable op-

and employments. But there were allegations readable as charges of misconduct unconnected with official duty or authority, and these left us unsure whether the plaintiffs really intended that the alleged wrongdoers' status as government officials should figure operatively in all of their counts. 167 U.S.App.D.C. at 240-241, 511 F.2d at 806-807.

47. *Id.* at 241 & n. 15, 511 F.2d at 807 & n. 15, citing *Paley* v. *Wolk*, *supra* note 43, 262 F.Supp. at 642-643, in which federal employees were being sued for receiving money under false pretenses, but the receipt was apparently "unrelated" to their official duties.

48. *Relf* v. *Gasch*, *supra* note 44, 167 U.S.App. D.C. at 241, 511 F.2d at 807 (footnote omitted).

49. *Id.* at 241 n. 12, 511 F.2d at 807 n. 12.

50. *Id.* at 241, 511 F.2d at 807 (footnote omitted).

51. We noted in addition that the transferee state's long-arm statute would not reach such defendants. 167 U.S.App.D.C. at 242 n. 18, 511 F.2d at 808 n. 18.

52. *Id.* at 242, 511 F.2d at 808. This was the ground for the concurring opinion, which deemed § 1391(e) otherwise available. *Id. Cf. Kipperman* v. *McConc*, 422 F.Supp. 860, 876-877 N.D. Cal. 1976); *Wu* v. *Keeney*, *supra* note 43, 384 F.Supp. at 1168.

portunity to decide these weighty questions bearing on its power to transfer. Clearly, our presumption in *Relf*—that action brought against persons who just happen to be, or to have been, federal officials are not within the ambit of Section 1391(e)—is by no means incompatible with our present holding that venue for damage actions against those who inflict injury under color of legal authority is governed by that section.

To the extent, then, that the District Court held that Section 1391(e) furnishes no basis for venue here, it was in error. That does not end the matter, however, for the order appealed from is predicated also upon insufficient service of process upon appellees.[53] To that issue we now turn.

II

As we noted at the outset,[54] the Federal Rules of Civil Procedure govern service of process in cases laying venue under Section 1391(e), "except that the delivery of the summons and complaint to the officer or agency . . . may be made by certified mail beyond the territorial limits of the district in which the action is brought."[55] Appellees were served in just that manner which, they assert, was improper either because Congress did not intend the exception to apply to suits such as this one, or because such service is constitutionally deficient.

As for the first contention, the House Report on Section 1391(e) correctly noted that its expansion of venue would be of little avail unless coupled with a modification

53. *Briggs* v. *Goodwin*, *supra* note 11, (order of May 4, 1975), set out at note 15 *supra*.

54. See text *supra* at note 16.

55. 28 U.S.C. § 1391(e) (1970).

of service demands then levied by the Civil Rules.[56] Thus, while the amended section retains the rules intact for service within the forum district it empowers the district courts to make valid service outside the district whenever venue lies by virtue of Section 1391(e).[57] It also authorizes service by certified mail in such situations whenever service can be effected only beyond the boundaries of the forum district.[58] Nowhere is there any intimation that these

56. H.R.Rep.No.536, *supra* note 36, at 4.

57. See text *supra* following note 16 and note 58 *infra*.

58. See text following note 16 *supra*. As the House Report put it "[s]ince this bill is designed to make a federal official amenable to suit locally, the bill provides that [service on the official] may be made by certified mail outside of the territorial limits of the district in which the action was brought. In all other respects, the summons and complaint is to be served as provided by the Federal Rules. . . ." H.R. Rep. No. 536, *supra* note 36, at 4 (emphasis added). Appellees read the Report's assertion that "where an action is only nominally brought against an official . . . service may be had in the manner provided by rule 4(d)(5)," *id.*, to imply a "negative corollary" that the service provision of § 1391(e) applies only to that situation. Brief for Appellees at 27-28. This inference is negated by the very next sentence in the House Report, which clearly contemplates that the "exception to the territorial limitation on service provided in this bill" is "equally applicable" to cases other than those within the compass of Rule 4(d)(5), such as, presumably, this one. H.R. Rep. No. 536, *supra* note 36, at 4. Thus § 1391(e) invokes the clauses in Fed.R.Civ.P. 4(f) (specifying the "Territorial Limit on effective service") and Rule 4(d)(7) (service upon an individual defendant) providing for statutory exceptions to their dictates.

Appellants also urge that if service is made under Rule 4(d)(5) it is *per se* insufficient to bring an official's pocketbook into jeopardy. That Rule's only peculiarity is its direction that service be made not only upon the officer, but upon the United States as well. Appellants here apparently did serve the United States; yet if service upon the appellees was affected agreeably with § 1391(e), it is hard to see how the additional service might redound to their injury. To the extent that *Griffith* v. *Nixon*, *supra* note 43, 518 F.2d at 1196, and *Green* v. *Laird*, 357 F.Supp. 227, 230 (N.D. Ill. 1973), suggest that service on the United States renders ineffective otherwise proper service on a federal officer, we refuse to follow them. Moreover, *Relf* v. *Gasch*,

changes were to affect some cases controlled by Section 1391(e) and not others,[59] and indeed any exception would be difficult to justify. That venue exists in a particular district would hardly console a plaintiff unable to serve officials who, though responsible for his plight, had withdrawn beyond the limits of effective service. And Congress must not have been content to rely simply on state long-arm statutes,[60] for it chose to supplement them in the category of cases encompassed by Section 1391(e) by providing extraterritorial service of its own device.[61] We find the service effected here to be fully within the ambit of congressional contemplation.

Nor do we perceive any constitutional problem in the statute as applied to this case.[62] Appellees pitch their

supra note 44, 167 U.S. App. D.C. at 242 n. 18, 511 F.2d at 808 n. 18, in no way conflicts with our interpretation. As we noted earlier, see notes 44-52 *supra* and accompanying text, our concern in *Relf* was that § 1391(e)—and Rule 4(d)(5)—did not extend to claims against officials sued as individuals, as opposed to claims deriving from action taken under color of legal authority.

59. See note 58 *supra*.

60. The District Court apparently gauged its jurisdiction by the local long-arm statute, D.C. Code § 13-423(a) (1973), and found it wanting. See note 15 *supra*. Precisely what measurement it undertook is unclear. If it assumed that its only vehicle for obtaining service was *via* that statute, it was, as indicated above, in error. If its reference was for the purpose of determining whether appellees had sufficient contacts with the forum to permit it constitutionally to exercise jurisdiction over them—the more likely possibility—it was similarly incorrect. See text and notes at notes 62-75 *infra*.

61. See H.R.Rep.No.536, *supra* note 36, at 4.

62. Appellees do not assert that service *via* certified mail is any less valid than personal service. Therefore, we do not pass on the question but merely note that the weight of authority might sustain the use of certified mail service in *in personam* actions such as this. Compare *Hess* v. *Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927), with *Wuchter* v. *Pizzutti*, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446 (1908). See also *McGee* v. *International Life Ins. Co.*,

constitutional argument on their supposed lack of minimum contacts with the District of Columbia,[63] resting on cases[64] holding "that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries."[65] To the extent that this position presupposes that Congress' constitutional authority to provide for the sound operation of the federal judicial system[66] is limited by the same constraints that apply to extraterritorial service by state tribunals, it builds on

355 U.S. 220, 221, 78 S.Ct. 199, 200, 2 L.Ed.2d 223, 225 (1950); *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306, 318-319, 70 S.Ct. 652, 656-660, 94 L.Ed. 865, 875-876 (1957). See generally Fox, *Motorists' Service of Process Acts*, 33 F.R.D. 151 (1963); Wilson, *Service of Process*, 39 U.Cinn.L.Rev. 487, 488-489 (1970); Note, *Service of Process by Mail*, 74 Mich.L.Rev. 381, 382 (1975) ("Service by mail without a return-receipt requirement complies with . . . due process").

63. Appellants, who pleaded, *inter alia*, a conspiracy between appellees and Goodwin, see note 7 *supra*, take the position that discovery would reveal that appellees did have substantial contacts with the District of Columbia, Brief for Appellants at 10 and footnote, but that they were prevented from conducting discovery during the pendency of appellees' motion to dismiss. *Id.* at 6. Since we do not accept appellees' lack-of-contacts contention, we need not pass on this question.

64. *Hansen* v. *Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 90L.Ed. 95 (1945).

65. *McGee* v. *International Life Ins. Co.*, *supra* note 62, 355 U.S. at 222, 78 S.Ct. at 200, 2 L.Ed.2d at 225. *Cf. Hansen* v. *Denckla*, *supra* note 64, 357 U.S. at 253, 78 S.Ct. at 1240, 2 L.Ed.2d at 1298 ("it is essential [to state court or diversity jurisdiction] in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities wihtin the forum State, thus invoking the benefits and protection of its laws").

66. See *Hanna* v. *Plumer*, 380 U.S. 460, 472, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8, 17 (1965).

sandy soil indeed. Whether or not Article III[67] mandated creation of any inferior federal courts at all,[68] it is a matter of general agreement that the discretion of Congress "as to the number, the character, [and] the territorial limits" of the inferior federal courts is not limited by the Constitution.[69] Congress might have established only one such court, or a mere handful;[70] in that event, nationwide service would have been a practical necessity clearly consonant with the Constitution.[71] That it was considered expedient to estab-

67. U.S.Const. art. III § 1 provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

68. Compare *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245, 11 L.Ed. 576, 581 (1845), with *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 330-331, 4 L.Ed. 97, 104 (1816). Compare J. Goebel, History of the Supreme Court of the United States, Antecedents and Beginnings to 1801, 246-247 (1971), with 1 Records of the Federal Convention of 1787, 124-127 (M. Ferrand ed. 1966). See also Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv.L.Rev. 49, 65-67 (1923).

69. *United States* v. *Union Pac. R. R. Co.*, 98 U.S. (8 Otto) 569, 602-603, 25 L.Ed. 143, 150 (1878). Accord, *Lockerty* v. *Phillips*, 319 U.S. 182, 187, 63 S.Ct. 1019, 1022, 87 L.Ed. 1339, 1342-1343 (1943); *Cary* v. *Curtis*, *supra* note 68, 44 U.S. at 245, 11 L.Ed. at 581. *Cf.* J. Goebel, *supra* note 68, at 247; 1 The Records of the Federal Convention of 1787, *supra* note 68, at 125.

70. See, *e.g.*, *Marlin* v. *Hunter's Lessee*, *supra* note 68, 14 U.S. at 331, 4 L.Ed. at 104. The early drafts of what became Article III provided for "one or more" inferior federal courts, but that provision was stricken without apparent explanation. 1 Records of the Federal Convention of 1787, *supra* note 68, at 116. See J. Goebel, *supra* note 68, at 210 n. 68. Indeed, The Federalist No. 81 (A. Hamilton) 544 (p. Ford ed. 1898) proposed that Congress "divide the United States into four or five or half a dozen districts; and to institute a federal court in each district, in lieu of one in every state."

71. See, e.g.,*Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438, 442, 66 S.Ct. 242, 245, 90 L.Ed. 185, 190 (1946); *Robertson* v. *Railroad Labor Bd.*, 268 U.S. 619, 622, 45 S.Ct. 621, 622, 69 L.Ed. 1119, 1121, (1925); *United States* v. *Union Pac. R. R. Co.*, *supra*

lish federal judicial districts in harmony with state boundaries[72] did not alter the scope of legislative discretion in this regard, and in fact Congress has, on occasion, provided for nationwide service.[73] While several cases have asserted apodictically that service outside a federal judicial district is governed by the same sort of "fairness standard" as is extraterritorial service by state courts,[74] this imputes

note 69, 98 U.S. at 604, 25 L.Ed. at 151 ("[t]here is . . . nothing in the Constitution which forbids Congress to enact that, as to a class of cases or a case of special character, a . . . court . . . in which the suit may be brought, shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision"); *Toland* v. *Sprague*, 37 U.S. (12 Pet.) 300, 328, 9 L.Ed. 1093, 1105 (1838).

72. The Judiciary Act of 1789, 1 Stat. 73 (1789), divided the United States into districts along state lines, except for establishment of districts in the Maine and Kentucky territories. This decision appears to have been motivated in part by the very spectre of nationwide service and the attendant inconvenience it might have caused. See J. Goebel, *supra* note 68, at 226, 460, 473; Warren, *supra* note 68, at 72. Thus, "a precedent was established, which is still unbroken [with but one exception, see Act of Feb. 13, 1801, ch. 4, §§ 4, 21, 2 Stat. 89, 96, repealed Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132] against the overlapping of state lines in the boundaries of federal judicial districts." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, The Federal Courts and the Federal System 33 (2d ed. 1973).

73. See, *e.g.*, the instances cited in *Robertson* v. *Railway Labor Bd.*, *supra* note 71, 268 U.S. at 624-625, 45 S.Ct. at 623-624, 69 L.Ed. at 1122; *Jaftex Corp.* v. *Randolph Mills, Inc.*, 282 F.2d 508, 512 (2d Cir. 1960); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1125 at 522-528 (1968); Comment, 7 Rut.Cam.L.J. 158, 162 n. 7 (1975).

74. *E.g.*, *Fraley* v. *Chesapeake & O. Ry.*, 397 F.2d 1, 3 (3d Cir. 1968); *Lone Star Package Co.* v. *Baltimore & O. R. R.*, 212 F.2d 147, 155 (5th Cir. 1954). *Fraley* relies on *Lone Star*, which in turn relies on *United States* v. *Scophony Corp.*, 333 U.S. 795, 818, 68 S.Ct. 855, 866, 92 L.Ed. 1091, 1106 (1948), applying the "fairness considerations" of *International Shoe Co.* v. *Washington*, *supra* note 64, to a determination as to whether a British corporation could be subjected to suit in the United States. Whether an alien is amenable to suit in this country is, as Professor Rheinstein has noted, a ques-

a constitutional magic to lines that Congress can at any time redraw. As tradition alone[75] works no such necromancy, we must reject appellees' constitutional argument as well.

III

We are requested by appellees at least to temper our view of the involved statute by its purportedly pernicious repercussions. Our answer must naturally be that it was for Congress alone to weigh those repercussions. Congress may not have anticipated that the flow of litigation of the sort at bar would rise from trickle to floodtide;[76] still we may not distort the statute to mollify its operation. If, as appellees melodramatically contend, application of Section 1391(e) as written "would subvert the orderly administration of the criminal justice system,"[77] it is Congress that should be alerted, for we are not at liberty to act on its stead.

To sum up, Section 1391(e)(1), providing as it does for venue in actions for redress of injuries inflicted by federal officials under color of legal authority, supports cognizance

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tion analogous to that presented when a state court attempts to exercise jurisdiction over someone not found in that state, and quite a different matter from applying such a test to a sovereign state's power to formulate jurisdictional tenets within its territorial limits. Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U.Chi. L.Rev. 775, 786-787, 796 (1955). *Cf. Shaffer* v. *Heitner*, 433 U.S. 186, 197-198, 97 S.Ct. 2569, 2576-2577, 53 L.Ed.2d 683 (1977).

75. See note 72 *supra*.

76. It has been noted that between 1961 and 1970 the number of civil rights actions filed in federal courts increased 1346%—from 296 to 3,985. H. Friendly, Federal Jurisdiction—A General View 16 (1973).

77. Brief for Appellees at 26.

of this litigation in the District of Columbia. That section also sanctions the use of certified mail for extraterritorial service in this action, and as so applied is constitutional. These conclusions require us to reverse the District Court's dismissal of appellants' action against Messrs. Stafford, Carrouth and Meadow, and to remand the case for further proceedings.

• • •

APPENDIX B

JOHN BRIGGS et al., Plaintiffs,

v.

GUY GOODWIN, Individually and as Attorney for the Department of Justice, Division of Internal Security, et al., Defendants.

CIV. A. No. 74-803.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA.

Nov. 20, 1974.

• • •

MEMORANDUM AND ORDER

AUBREY E. ROBINSON, JR., District Judge.

In this civil action, Plaintiffs seek declaratory relief and damages for alleged violations of their constitutional rights which arose from the criminal case of United States v. Briggs, G.C.R. 1353 (the "Gainesville 8" case) in which eight of the Plaintiffs herein were acquitted of conspiracy. The Defendants Guy Goodwin, William H. Stafford, Jr. and Stuart J. Carrouth are attorneys with the Department of Justice and were responsible for conducting the investigation, the grand jury proceedings and the prosecution of that case. Defendant Claude Meadow is a special agent of the Federal Bureau of Investigation and was also involved in the investigation.

After the Plaintiffs served a notice to take the deposition of Defendant Guy Goodwin, remaining Defendants moved for a transfer of venue and for a stay of the deposition

pending a ruling on their motion for transfer. In the alternative, Defendants Stafford, Carrouth and Meadow moved to dismiss and for a stay of Defendant Goodwin's deposition pending the filing of and a determination on a Motion to Dismiss as to Defendant Goodwin on the grounds of immunity. On July 19, 1974, this Court ordered that the deposition of Defendant Goodwin be stayed pending a determination on the question of his immunity from prosecution, without prejudice to the pending motions of the other Defendants.

The Court finds that the Motion to Dismiss filed by Defendant Guy Goodwin and the Motion to Transfer this case to the Northern District of Florida filed by Defendants Stafford, Carrouth and Meadows are both ripe for determination. For reasons explained hereinafter, both Motions must be denied.

In their Complaint, Plaintiffs have alleged that Defendant Goodwin violated their constitutional rights by committing perjury when questioned under oath by a United States District Judge concerning the presence of government informants in the "defense camp". Relying upon two recent cases from the Third Circuit and several earlier cases from the Second and District of Columbia Circuits, Defendant Goodwin moves to dismiss the Complaint as to him. He contends that as a special attorney of the United States Department of Justice and federal prosecutor, he is absolutely immune from any damage claim based upon his alleged misconduct while acting in his official capacity.

Plaintiffs oppose this Motion and contend that the doctrine is inapplicable on the grounds that the alleged misconduct in this case is beyond the scope of any official duty and is in violation of federal law. Plaintiffs rely upon recent cases from the Fourth, Sixth and Seventh Circuits which reject absolute immunity and adopt a qualified

immnuity for prosecutors. They contend that the recent case of Apton v. Wilson, 165 U.S.App.D.C. —, 506 F.2d 83 (1974), No. 73-1614, decided August 16, 1974, indicates a trend in this Circuit toward adopting this developing analytical view of the doctrine.

After careful analysis of the numerous cases cited by counsel in this action, the Court concludes that Defendant Goodwin's Motion to Dismiss for failure to state a claim upon which relief can be granted based upon absolute prosecutorial immunity must be denied at this juncture.

As the cases indicate, the doctrine of immunity for quasi-judicial officers like prosecutors derives from the fact that in the course of performing their official duties, they often exercise a discretion similar to that exercised by judges. The Courts have reasoned that to ensure vigorous and effective enforcement of the laws, prosecutors should be protected from possible vindictive lawsuits arising from their activities in performing that function. This need for freedom from procedural constraints in performing their discretionary functions and the built-in safeguards within the judicial process to check misconduct are together considered justification for extending the judicial immunity doctrine to prosecutors.

However, several recent cases indicate that this "quasi-judicial" immunity is not absolute. Scheuer *v.* Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Apton, *supra,* Robichaud *v.* Ronan, 351 F.2d 533 (9th Cir. 1965); Lewis *v.* Brautigam, 227 F.2d 124 (5th Cir. 1955); Hilliard *v.* Williams, 465 F.2d 1212 (6th Cir. 1972), cert. denied, 409 U.S. 1029, 93 S.Ct. 146, 34 L.Ed.2d 322 (1972). These cases indicate a growing trend toward determining the applicability of quasi-judicial immunity by analyzing the nature of the activity being performed. Where performing functions closely aligned with the judicial process such as presenting evidence to the grand jury or prosecuting at trial, prosecutors still enjoy absolute immunity. But as the nature of the activity moves further from the judicial process, the Courts have held that immunity becomes less functional and is therefore not absolute.

The Defendants reasonably rely upon Cooper *v.* O'Connor, 69 App.D.C. 100, 99 F.2d 135 (1938) and Laughlin *v.* Garnett, 78 U.S.App.D.C. 194, 138 F.2d 931 (1943) as authority for their contention that this jurisdiction follows the theory of absolute immunity. However, the Court reads the more recent case of *Apton, supra,* which interprets *Scheuer, supra,* as indicating a trend in this Circuit to adopt an analytical approach to and a more restrictive application of the doctrine of quasi-judicial immunity. Although these recent cases are factually distinguishable from the case at hand, the reasoning of the opinions indicates to this Court that assertions of quasi-judicial immunity cannot be rigidly accepted on their face, but rather an analysis of the activity being performed at the time the alleged misconduct occurred is required to determine the applicability of the doctrine.

Where, as in this case, a prosecutor is alleged to have committed perjury, an activity beyond the scope of his authority, in clear violation of law and far removed from the discretionary areas of the judicial process traditionally protected by the quasi-judicial immunity doctrine, the Court concludes that this doctrine is not applicable. Therefore, Defendant Goodwin's Motion to Dismiss on these grounds must be denied.

In addition, the Court concludes that the Motion to Transfer this action in accordance with 28 U.S.C. § 1404

and § 1406 filed by Defendants Stafford, Carrouth and Meadows must also be denied. Title 28 U.S.C. § 1391 (e)(1) provides that proper venue lies where a Defendant in the action resides. Since Defendant Goodwin's Motion to Dismiss has been denied, and he remains in this action, the Court finds venue proper in this District. It is well established law that a plaintiff's choice of venue is given preference and the burden of establishing that an action should be transferred is on the moving party. 1 Moore's Federal Practice § 1.145[5]. The Court finds that Defendants here have failed to meet that burden, and thus their Motion to Transfer to the Northern District of Florida must be denied.

Upon the above considerations, it is by the Court this 20th day of November, 1974;

Ordered, that Defendant Guy Goodwin's Motion to Dismiss this action be and hereby is denied; and it is

Further ordered, that the Motion to Transfer filed by Defendants Stafford, Carrouth and Meadows, be and hereby is denied.

• • •

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 74-803

JOHN K. BRIGGS, ET AL.,

Plaintiffs,

v.

GUY GOODWIN, ET AL.,

Defendants.

ORDER

Upon consideration of the Alternative Motion of Defendants Stafford, Carrouth and Meadow to Dismiss this Action as to them for Lack of Jurisdiction over their Persons, Improper Venue, Insufficiency of Process and Insufficiency of Service of Process, the memoranda of points and authorities in support thereof and in opposition thereto, it appearing to the Court that service of process upon said defendants was made by certified mail; that the Complaint fails to allege the defendants transacted any business in the District of Columbia or caused tortious injury to plaintiffs in the District of Columbia by an act or omission therein as required by District of Columbia Code § 13-423(a); that the action against said defendants could not have been brought in this Court prior to the enactment of 28 U.S.C. § 1391(e) and is not one in essence against the United States as

required by § 1391(e); and that by reason thereof the Court lacks venue and *in personam* jurisdiction with respect to defendants Stafford, Carrouth and Meadow, service of process on them was insufficient, and the action as to these defendants should be dismissed, it is, therefore, by the Court this 4th day of March 1975:

ORDERED that the Alternative Motion of Defendants Stafford, Carrouth and Meadow to dismiss this action be, and the same hereby is, granted; and it is further

ORDERED that this action be, and the same hereby is, dismissed as to defendants William H. Stafford, Jr., Stuart J. Carrouth, and Claude Meadow.

Dated: March 4, 1975

AUBREY E. ROBINSON, JR.
s/.....
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-803

JOHN BRIGGS, *et al.*,
Plaintiffs,

v.

GUY GOODWIN, individually and as Attorney for the Department of Justice, Division of Internal Security, *et al.*,
Defendants.

ORDER OF FINAL JUDGMENT AS TO DEFENDANTS STAFFORD, CARROUTH AND MEADOW

On the prior Order of this Court entered March 4, 1975 dismissing this action as to defendants William H. Stafford, Jr., Stuart J. Carrouth and Claude Meadow, it appearing to the Court that there is no just reason for delay in the entry of final judgment on said Order, and the Court expressly so determines, it is, therefore, by the Court, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this 4th day of April, 1975:

ORDERED that final judgment be, and the same hereby is, entered on said Order of March 4, 1975 dismissing this action as to defendants William H. Stafford, Jr., Stuart J. Carrouth and Claude Meadow.

/s/ AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 19
No. 75-1578—Civil 74-803

JOHN BRIGGS, ET AL.,

Appellants,

v.

GUY GOODWIN, Individually and as Attorney for the Department of Justice, ET AL. [STAFFORD, ET AL.]

APPEAL FROM the United States District Court for the District of Columbia.

BEFORE: McGOWAN, ROBINSON and WILKEY, Circuit Judges

JUDGMENT

THIS REVUE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment ..... of the District Court appealed from this cause is hereby reversed and the case is remanded to the District Court for further proceedings in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court:
GEORGE A. FISHER
George A. Fisher, *Clerk*

Date: September 19, 1977

Opinion for the Court filed by Circuit Judge Robinson

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed Sep 21 1977

GEORGE A. FISHER, *Clerk*

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1578
Civil Action #74-803

JOHN BRIGGS, *et al.*,

Appellants,

v.

GUY GOODWIN, Individually and as Attorney for the Department of Justice, *et al.*

BEFORE: McGowan, Robinson and Wilkey, Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed by appellees Guy Goodwin, et al, and it appearing that appellees filed a motion to lodge documents in connection with the petition for rehearing, it is

ORDERED by the Court that appellees' motion to lodge documents is granted and the Clerk is directed to lodge said documents, and it is

FURTHER ORDERED by the Court that appellee's petition for rehearing is denied.

Per Curiam
For the Court:
GEORGE A. FISHER, *Clerk*

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1578
Civil Action #74-803

JOHN BRIGGS, *et al.*,

Appellants,

v.

GUY GOODWIN, Individually and as Attorney for the Department of Justice, *et al.*

BEFORE: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellees Guy Goodwin, et al, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court *en banc* that appellees' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, *Clerk*

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-699

WILLIAM H. STAFFORD, JR., ET AL.,

Petitioners,

v.

JOHN BRIGGS, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 30, 1978.

THE CHIEF JUSTICE

.....

Chief Justice of the United States

Dated this 23rd day of February, 1978

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 1450

RICHARD BERTOLI,

Plaintiff,

—against—

THE SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants.

MEMORANDUM AND ORDER

OWEN, District Judge

Before me are three motions. The first is by defendants to dismiss plaintiff's complaint seeking declaratory and injunctive relief, as well as damages, as a result of allegedly illegal searches and seizures conducted at various offices in New York and New Jersey in violation of plaintiff's fourth amendment rights. The second and third motions are cross motions having to do with discovery, pro and con.

Turning to the first motion and the declaratory relief sought in this case—that any use in connection with a civil or criminal investigation or prosecution of information garnered or materials seized from the various locations in New Jersey and New York in alleged violation of plaintiff's fourth amendment rights is illegal—it is essentially equivalent to the injunctive relief sought, that is, a prohibition

against the use of any such information or materials. A grant of declaratory or injunctive relief would in these circumstances have substantially the same effect as an order pursuant to Fed. R. Crim. P. 41(e) for the return of the seized property, which I am denying in a separate memorandum and order because of a related criminal indictment against plaintiff pending in the District of New Jersey.

It would be a manifest abuse of discretion for this court to exercise jurisdiction over the requests for injunctive and declaratory relief where, as here, to do so would necessarily be to interfere with criminal proceedings pending in another federal judicial district. *See Smith* v. *Katzenbach,* 351 F.2d 810, 816 (D.C. Cir. 1965). Accordingly, defendants' motion to dismiss plaintiff's first two prayers for relief, denominated XIII(a) & (b) in the complaint, is granted.

Plaintiff's allegation of $2,000,000 damages is based on the theory of *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971).[1] The named defendants move to dismiss it on the ground that the complaint fails to state a claim upon which relief may be granted, and defendants Johnathan L. Goldstein, the United States Attorney for the District of New Jersey at the time the complaint was filed, and Charles J. Walsh, an employee of the United States Attorney for the District of New Jersey, claim in addition that the court lacks personal jurisdiction over them for purposes of the *Bivens* claim because they were not served

1. Plaintiff maintains that the facts pleaded in the complaint also state a claim for relief under 42 U.S.C. §§ 1985(3) & 1986. There is no merit to this claim. At the minimum, there must be an allegation, which is lacking here, of some "class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin* v. *Breckenridge,* 403 U.S. 88, 102 (1971) (footnote omitted). In addition, these sections of Title 42 are inapplicable to federal officials acting under color of federal law. *Williams* v. *Halperin,* 360 F. Supp. 554, 556 (S.D.N.Y. 1973).

within the state and the complaint fails to state facts upon which the court could assert long-arm jurisdiction over them pursuant to Fed. R. Civ. P. 4(e) and N.Y.C.P.L.R. § 302(a)(2).

The vice of plaintiff's complaint with respect to the *Bivens* cause of action against the eight named defendants associated with the SEC is that the complaint merely identifies them as "officials and employees of the SEC," and thereafter never refers to any of them again by name. Instead, plaintiff refers throughout to the "defendants" and the "defendants acting individually and/or in concert". With plaintiff alleging numerous illegal searches and seizures at various locations over a period of more than nine months, this type of pleading is obviously unfair and insufficient. It is impossible for any of the named defendants to know from the complaint exactly what he is being made to answer for, and where and when the actions complained of against him were taken.

In order to withstand a motion to dismiss a *Bivens*-based claim must assert as to each defendant—named or unnamed—his personal participation in the conduct complained of, *see, e.g., Buck* v. *The Board of Elections,* 536 F.2d 522, 524 (2d Cir. 1976), and just as in the case of a civil rights complaint brought under 42 U.S.C. § 1983 against a state official, liability may not be predicated merely upon the doctrine of *respondent superior. E.g., Black* v. *United States,* 534 F.2d 524, 527-28 (2d Cir. 1976); *Morpurgo* v. *Board of Higher Education,* 423 F. Supp. 704, 713-14 (S.D.N.Y. 1976).

Plaintiff's conclusory allegations of conspiracies to deprive him of his fourth amendment rights, lodged against these defendants without the pleading of overt acts committed by them in furtherance of the conspiracy, are also insufficient to state a claim for relief. *See Jacobson* v.

Organized Crime and Racketeering Section of the United States Department of Justice, 544 F.2d 637, 639 (2d Cir. 1976), *cert. denied,* 45 U.S.L.W. 3666 (U.S. Apr. 5, 1977); *Powell* v. *Workmen's Compensation Board,* 327 F.2d 131, 137 (2d Cir. 1964).

Against these standards it is plain that plaintiff has failed to state a *Bivens* claim upon which relief may be granted against the eight defendants assertedly associated with SEC.

Of course, the foregoing applies equally well to defendants Goldstein and Walsh. In addition, the allegations made specifically against them on information and belief, see ¶¶ 11 and 53 of the complaint, suffer from the same infirmity previously discussed—lack of specificity.

Lastly, plaintiff relies on 28 U.S.C. § 1391(e) as conferring personal jurisdiction on this court over defendants Goldstein and Walsh. This section, however, only controls venue once personal jurisdiction and jurisdiction over the subject matter are independently established. *United States ex rel. Rudick* v. *Laird,* 412 F.2d 16, 20 (2d Cir.), *cert. denied,* 396 U.S. 918 (1969). Since defendants Goldstein and Walsh were not served in the Southern District of New York and the conclusory allegations of conspiracy or agency are insufficient to confer long-arm jurisdiction over them under N.Y.C.P.L.R. § 302, *see Lehigh Valley Industries, Inc.* v. *Birenbaum,* 527 F.2d 87, 89&n.1, 93-94 (2d Cir. 1975), this court must dismiss the *Bivens* claim against them on the additional ground of lack of personal jurisdiction.

Plaintiff has recently apprised the court in an unverified letter of the names of several of the persons alleged by him to have actually committed the searches and seizures complained of. Accordingly, plaintiff will be given leave to replead against those whom he can properly charge by

name, and plaintiff will also be afforded discovery to the extent necessary to learn who else, if anyone, was on the premises allegedly controlled by him and in violation of his fourth amendment rights.

However, since a substantial criminal prosecution is facing plaintiff in the District of New Jersey, and since many, including potentially dispositive threshhold issues in the *Bivens* action will no doubt be determined in the New Jersey prosecution, this court will defer further proceedings in the instant case until after the pending criminal charges in the District of New Jersey have been resolved, both in the interest of judicial economy, *see United States* v. *American Radiator & Standard Sanitary Corp.*, 388 F.2d 201, 204 (3d Cir. 1967), *cert. denied*, 390 U.S. 922 (1968), and also to protect the government from having to comply with discovery demands of plaintiff in a civil suit as an expedient to circumvent the more restrictive discovery applicable rules in criminal cases, *e.g.*, *Campbell* v. *Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963). *See United States* v. *Kordel*, 397 U.S. 1, 12 n.27 (1970). Thus, plaintiff's motion for an order compelling defendants to answer his interrogatories is also denied, without prejudice.

In sum, plaintiff's claims for declaratory and injunctive relief are dismissed, the *Bivens* claim against all ten named defendants is dismissed without prejudice and with leave to replead, provided, however, that further proceedings, including repleading pursuant to leave, are deferred pending the outcome of plaintiff's trial on criminal charges in the District of New Jersey.

Submit order on notice.

November 4, 1977.

R. Owen
United States District Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

For the Western District of Texas
El Paso Division

No. EP-77-CA-35

Ilse M. Sigler, *et al*,
Plaintiffs,

v.

Major General C. J. Levan, *et al*,
Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs have filed the instant Complaint alleging that the Defendants, individually and acting in combination, conspiracy and concert of action, either murdered Ralph J. Sigler or placed him in a position of extreme danger and failed to protect him, in violation of the Fifth Amendment to the Constitution of the United States of America, and that the Defendants, individually and acting in combination, conspiracy and concert of action, did, in violation of the Fourth Amendment to the Constitution of the United States of America, unlawfully seize the papers, personal property, and memorabilia of Ralph J. Sigler. Plaintiffs allege that the Defendants, in committing such actions, were acting in their official capacity or under the color of legal authority.

I.

Plaintiffs' Complaint asserts that this Court has venue of this action under 28 U.S.C. § 1391(b) and (e). Those provisions are:

> "(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.
>
> (e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> "The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the Rules may be made by certified mail beyond the territorial limits of the district in which the action is brought." 28 U.S.C. § 1391.

Defendant, MAJOR GENERAL C. J. LEVAN, has moved the Court to dismiss Plaintiffs' claim against LEVAN asserting, among other things, that Section 1391 does not authorize maintenance of this suit in the Western District of Texas. LEVAN contends specifically that Plaintiffs' asserted basis for venue, Section 1391(4) does not apply to a suit against an individual officer of the United States when that suit

requests relief in the form of money damages for defendant's individual action.

II.

Plaintiffs' claim can be summarized as a claim for relief based on two separate theories. First, Plaintiffs claim monetary damages resulting from the death of Ralph J. Sigler because of Defendants' alleged violation of Ralph J. Sigler's rights under the Fifth Amendment to the Constitution of the United States of America. Second, Plaintiffs seek to recover Ralph J. Sigler's papers, chattels, and memorabilia allegedly wrongfully taken from Ralph J. Sigler in violation of his rights under the Fourth Amendment to the Constitution of the United States of America. Plaintiffs' first claim is for monetary relief and their second claim is in the form of a request for a mandatory injunction.

III.

Defendant LEVAN contends that 28 U.S.C. § 1391(e) is inapplicable to an action against a Government official for monetary damages. Defendant argues that, although the literal reading of the statute provides venue in a district where the plaintiffs reside, that provision cannot be read literally, but must be read in conjunction with 28 U.S.C. § 1361, providing the District Court of the United States with jurisdiction over mandamus proceedings against a Government official.

Plaintiffs respond with the contention that Section 1391(e)(4) provides a basis for venue as it makes no distinction between actions in the nature of injunction and mandamus on one hand and actions for monetary damages on the other hand.

IV.

In support of his argument that Section 1391(e) is inapplicable to Plaintiffs' cause of action seeking monetary relief, Defendant relies most heavily on the case of *Natural Resources Defense Counsel, Inc.* v. *Tennessee Valley Authority,* 459 F.2d 255 (2nd Cir. 1972). In *Natural Resources,* plaintiff, a New York resident, sued a defendant whose residence was established by federal statute in Alabama. Plaintiff sought to maintain venue in New York, (plaintiff's residence), under 28 U.S.C. § 1391(3)(4). Defendant moved to dismiss the claim for lack of proper venue, contending that Section 1391(e) was not intended to apply to an action against a locally based federal business corporation such as the TVA, but only to actions against federal officers or agencies which, prior to enactment of Section 1391(e) could have been brought only at the seat of federal government, in the district court for the District of Columbia.

In ruling that Section 1391(e) did not provide a basis for venue of plantiff's claim, Chief Judge Friendly made a searching analysis of the history and purpose behind that section. Section 1391(b) was only a part of the Congressional enactment of Public Law No. 87-748, 87th Congress (1961). The companion statute is codified as 28 U.S.C. § 1361, which gives the United States District Court original jurisdiction of actions in the nature of mandamus to compel an officer or employee of the United States or any agency of the United States to perform a duty owed to the plaintiff. The Judicial Subcommittee to which the original bill was referred reported as follows:

> "The purpose of this bill is to make it possible to bring actions against Government officials and agencies in the United States District Courts outside the

> District of Columbia, on jurisdiction and venue, may now be brought only in the U.S. District Court of the District of Columbia." H.R. Rep. No. 536, 87th Congress, First Session, page 1.

The need for such legislation arose from the decision in *McIntire* v. *Wood,* 11 U.S. (7 Cranch) 504, 3 L.Ed. 420 (1813), denying to the lower federal courts mandamus jurisdiction over federal officers, with the exception of mandamus actions maintained in the District of Columbia. *Kendall* v. *United States ex. rel. Stokes,* 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1838). In addition to the unavailability of the federal district court for mandamus actions, injunctions were permissible only when the superior officer in Washington was not an indispensable party, as he was the individual who would be required to take the action requested by the injunction. *Williams v. Fanning,* 332 U.S. 490, 493, 68 S.Ct. 188, 189, 92 L.Ed. 95 (1947).

The decision in *Natural Resources* was based on the opinion of the United States Court of Appeals for the Second Circuit that the specific purpose of Section 1391(e) was to broaden the venue of civil actions which should have previously been brought only in the District of Columbia. *Id.* at 259. The Court concluded that, since the TVA could, prior to the enactment of Section 1391(e), be sued outside the District of Columbia, Section 1391(e) was inapplicable to an action against the TVA. The TVA had always been subject to suit, with the same venue limitations as other corporations in any district in which it did business. *Id.* at 259.

Defendant Levan concludes, therefore, that an action against a federal employee in his individual capacity, seeking the remedy of monetary damages, is not governed by Section 1391(e), as it is not the type of action which could

previously have been brought only in the District of Columbia.

V.

Plaintiffs contend that the law in Fifth Circuit, as evidenced by *Ellinburg* v. *Connet,* 457 F.2d 240 (5th Cir. 1972), dictates that Section 1391(e)(4) provides venue in the district of plaintiff's residence for a cause of action against a federal employee in his individual capacity, seeking monetary relief.

In *Ellinburg,* petitioner was a prisoner at Texarkana, Texas, within the Eastern District of Texas. Petitioner filed a petition for mandamus against several prison officials residing in Texarkana, requesting that the Court order the defendant (1) to remove detainers against the petitioner, (2) to drop the practice of opening Petitioner's mail, (3) to grant petitioner the "minimum custody" status, (4) to stop spying on the prisoners, and (5) to refrain from serving unequal portions of food to different prisoners. The trial court dismissed the petition, saying that it was a habeas corpus petition which must be brought in the district where the prison was located.

The United States Court of Appeals for the Fifth Circuit concluded that the district court was erroneous in characterizing the petition as a habeas corpus petition, holding that it was a petition in the nature of mandamus. The Court then looked to each of the specific venue alternatives under Section 1391(e). Subsection 1 thereof provides that the action may be brought in a district where a defendant resides. None of the defendants resided within the Northern District; therefore, venue was not proper under Subsection 1.

Subsection 2 provides that venue is properly laid where a cause of action arises. Plaintiff's complaint did not state

that any cause of action arose within the Eastern District of Texas; therefore, venue under Subsection 2 was not proper.

Subsection 3 provides venue only in a case where real property is involved. The Court concluded that Subsection 3 was inapplicable.

Subsection 4, providing venue in the place of plaintiff's residence, gave rise to the Fifth Circuit's surmise that venue may properly have been laid in the Northern District of Texas. The Court noted that, although petitioner was incarcerated in Texarkana, within the Eastern District of Texas, the record did not adequately show whether petitioner may actually have been a resident of the Northern District of Texas. The Court remanded the case to the trial court for a determination of whether plaintiff was a resident of the Northern District.

The opinion in *Ellinburg* is lacking in analysis of the purposes and history of Section 1391(e). The Court did not differentiate between a claim for monetary damages and a request for mandamus. It is clear from a reading of the *Ellinburg* opinion that plaintiff's original petition contained requests for mandamus and injunctive relief. If monetary damages were requested, that request was clearly incidental to plaintiff's primary remedial request.

The main thrust of the *Ellinburg* opinion was that the trial court failed to consider all possibilities for appropriate venue, and should have been more deliberate in broadly construing the pro se complaint of the petitioner.

Plaintiffs cite several district court cases in support of the proposition that Section 1391(e)(4) provides venue in the district of plaintiff's residence in a suit requesting monetary relief.

Lowenstein v. *Rooney,* 401 F.Supp. 952 (E.D.N.Y. 1975) was an action against government officials in Washington,

alleging that those officials took action in Washington, D.C., to conspire against the plaintiff and cause him to lose a Congressional election. Plaintiff's complaint sought declaratory and injunctive relief as well as damages.

In determining that venue was properly laid in New York, the district of plaintiff's residence, the Court cited legislative history to the effect that Section 1391(e)(4) applied to an action where the defendant was allegedly "acting within the apparent scope of his authority and not as a private citizen." H.R. 1960, 87th Congress, First Session (1961); *Id.* at 962. The Court, however, undertook no analysis of the history or purpose of Section 1391(e), nor did it address the legislative history providing that the purpose of that section was to broaden the venue provision of those actions which previously could have been brought only in the District of Columbia.

The *Lowenstein* opinion is directly at odds with the opinion in *Natural Resources,* and does not attempt to distinguish *Natural Resources* or to be compatible with *Natural Resources,* although the Court rendering the *Lowenstein* decision is within the Second Judicial Circuit, the Circuit which rendered the *Natural Resources* opinion.

Plaintiffs also rely on *Briggs* v. *Goodwin,* 384 F.Supp. 1228 (D.D.C. 1974) and *Wu* v. *Kenny,* 384 F.Supp. 1161 (D.D.C. 1974). In *Briggs* plaintiff brought a suit against four government attorneys who had been in charge of a former criminal prosecution against the plaintiffs where plaintiffs had been acquitted. On a motion by the defendants to transfer the case from Washington, D.C. to North Carolina, the Court ruled that Section 1391(e) provided venue, as it was the place of residence of one of the defendants. There was no discussion of the legislative history of Section 1391(e). Additionally, the Court was not concerned, as is the Court in the instant case, with the subsection of Section 1391(e) dealing with venue in the place of Plaintiffs' residence. There was no discussion of the relief requested, and whether that relief was monetary or in the form of injunctive or mandatory relief. The Court merely concluded that the burden rested upon the Defendants to show reason why there should be a transfer, and that Defendants had failed to meet that burden. *Id.* at 1230.

In *Wu* the plaintiff sued the defendants for statements allegedly made by defendants, which statements lead to the denial of plaintiff's application for a grant from the National Endowment for Humanities. The summons and complaint were served upon the defendants in the manner provided in Section 1391(e), that is, by certified mail beyond the territorial limits of the district in which the action was brought. The Court rejected the defendants' contention that Section 1391(e) was inapplicable in a tort action for damages, and concluded that Section 1391(e) was applicable, since such actions were "probably not specifically contemplated by Congress," but appeared to fall within the literal bounds of Section 1391(e). *Id.* at 1168.

The continuing authority of *Briggs* and *Wu* is questionable in light of dicta from the United States Court of Appeals for the District of Columbia in *Relf* v. *Gasch,* 511 F.2d 804 (D.C. Cir. 1975), stating that Section 1391(e) applies only if a claim is stated against a federal officer in his official capacity; in actions involving a federal officer individually, the rule is not available. *Id.* at 808, n. 18.

VI.

The Court finds the decisions in cases limiting the applicability of Section 1391(e) to be the better-reasoned authority. These decisions thoroughly consider the legislative history of the statutes, analyze the historical inability

to proceed against government officials acting in their official capacity, and analyze the distinctions between the nature of the relief requested by Plaintiffs attempting to lay venue under Section 1391(e). *See Quinata* v. *Kelly.* 430 F.Supp. 1328 (E.D.Pa. 1977); *Rimar* v. *McCowan,* 374 F.Supp. 1179 (E.D.Mich. 1974); *Davis* v. *Federal Deposit Insurance Corp.,* 369 F.Supp. 277 (D.C.Colo. 1974); and *Holicky* v. *Selective Service Local Board No. 3,* 328 F.Supp. 1373 (D.C.Colo. 1971).

VII.

In Plaintiffs' claim for deprivation of Fifth Amendment rights, seeking monetary relief from the Defendants, all acts alleged to have been committed by the Defendants occurred outside the Western District of Texas. Plaintiffs do not claim that a cause of action arose, with respect to that cause of action, within the Western District of Texas. The allegations of Plaintiffs' Complaint are that Mr. Sigler reported, as ordered by the Defendants, to Ft. Meade, Maryland where he was subjected by the Defendants to extensive questioning and various types of threats and intimidations, the intent and effect of which was to force Mr. Sigler to end his own life.

Plaintiffs' asserted basis for jurisdiction is 28 U.S.C. § 1331(a), giving this Court jurisdiction over a cause of action arising under the Constitution of the United States of America. In such an action, when jurisdiction is not founded solely on diversity of citizenship, the appropriate venue is where all defendants reside, or where the claim arose, except as otherwise provided by law. Where Court to construe Section 1391(e), applying to actions against an officer of the United States, as allowing an action for monetary damages to be brought in the district of Plaintiffs' residence, the Court would be allowing Section 1391(e) to

expand the venue provision stated in Section 1391(b). In view of the legislative history of Section 1391(e), the Court concludes that it was not the intent of Congress to broaden venue in actions which could previously have been brought in any district wherein the claim arose.

Prior to the enactment of Section 1391(e), the Plaintiffs in this type of cause would not have been deprived of a forum at the place where the claim arose, as they would have been if the actions were one in the nature of mandamus or injunction. The Court concludes that it was not the intent of Congress to broaden venue provisions for an action requesting monetary damages, as such actions were not the evils at which Section 1391(e) was aimed.

An additional policy reason for refusing to allow a forum in the district of Plaintiffs' residence is the necessity of having government officials present in the places where they conduct their day-to-day activities. It is entirely proper to require a government official to be present at Court sessions and appear for Court proceedings in a district in which that official may have conducted illegal activity. However, to require a government official to be subject to suit at any point where a plaintiff may happen to reside, merely because that official may have conducted some activity in the Government's Capital, would be an undue burden on those persons who are responsible for Government operations.

The Court concludes, therefore, that the Western District of Texas is an improper place for the hearing of Plaintiff's claim against the Defendants for violation of Plaintiffs' Fifth Amendment rights claiming monetary damages from the Defendants.

VIII.

Defendant LEVAN does not consent the venue of Plaintiffs' claim for alleged deprivation of Fourth Amendment rights, which claim seeks relief in the nature of an injunction against the Defendants. That action is properly maintainable in the Western District of Texas, as it is the type of action at which Section 1391(e) was aimed.

IX.

The Western District of Texas is an appropriate venue for the maintenance of Plaintiffs' claim for violation of Ralph J. Sigler's Fourth Amendment rights, but is an improper venue for Plaintiffs' claim of Fifth Amendment violations.

Under the provisions of 28 U.S.C. § 1406(a), the Court, if it be in the interest of justice, may transfer a case to any district or division in which it could have been brought. The allegations of Plaintiffs' Complaint are to the effect that the wrongful death of Ralph J. Sigler occurred at Ft. Meade, Maryland, and that the Defendants' actions leading to Sigler's death were committed at Ft. Meade, Maryland. The Court will, therefore, transfer Plaintiffs' cause of action for violations of Fifth Amendment rights to the district court of Maryland.

Defendant LEVAN is the only one of the Defendants who has moved for dismissal for inappropriate venue. The parties have not briefed the question of transfer of the case against all Defendants.

The parties have not addressed the question of whether the Court should transfer the entire case, including the Fourth Amendment claim, in the interest of justice and for the convenience of parties and witnesses, pursuant to 28

U.S.C. § 1404(a). Under that section, the case may be transferred to any other district or division where it might have been brought. The parties have not briefed the question of whether Plaintiffs' claim of seeking the return of allegedly illegally seized documents might also have been brought in the district court in Maryland.

The Court, therefore, will withhold the transfer of the Fifth Amendment claim against Defendant LEVAN to the district court of Maryland, will withhold a determination of whether to transfer the Fifth Amendment claim against the other Defendants and will withhold a determination of whether to transfer the Fourth Amendment claim, pending receipt, from all parties in this cause, of briefs pertaining to whether the entire action pending in the Western District of Texas should be transferred to the district court in Maryland.

X.

IT IS THEREFORE ORDERED that all parties in this cause file with the Court, within twenty (20) days of this date, briefs addressing the issue of whether the Court should, in addition to transferring Plaintiffs' Fifth Amendment claim against Defendant LEVAN to the district court of Maryland, also transfer Plaintiffs' Fourth Amendment claim and Fifth Amendment claim against the other Defendants to the district court of Maryland, pursuant to 28 U.S.C. § 1404(a).

March 22, 1978

WILLIAM S. SESSIONS

William S. Sessions
United States District Judge

APPENDIX J

Pending cases of which petitioners are aware in which the questions presented are being or have recently been litigated.

1. Blair *v.* Baumgardner, Civil Action No. 77-C-390 (E.D. Wisc.)

2. Halkin *v.* Helms, Civil Action No. 75-1773 (D.D.C.)

3. The Black Panther Party *v.* Levi, Civil Action No. 76-2205 (D.D.C.)

4. Sigler *v.* LeVan, Civil Action No. EP77-CA 35 (W.D. Tex.)

5. Driver *v.* Helms, No. 77-1482 (1st Cir.)

6. Todd *v.* Brown, Civil Action No. 77-185-TUC-MAR (D. Ariz.)

7. Lamont *v.* Haig, No. 75-2006 (D.C. Cir.)

8. Guilday *v.* Department of Justice, Civil Action No. 4578 (D. Del.)

9. McCarthy *v.* Jonnard, Civil Action No. 77-695-A (E.D. Va.)

10. Misko *v.* United States, Civil No. 77-875 (D.D.C.)

11. Berlin Democratic Club *v.* Brown, No. 310-74 (D.D.C.)

12. Horman *v.* Kissinger, Civil Action No. 77-1748 (D.D.C.)

13. Mason *v.* Clayton, Civil Action No. 77-0995 (D.D.C.)

14. Bertoli *v.* SEC, 77 Civ. 1450 (S.D.N.Y.)

15. National Lawyers Guild *v.* Attorney General, 77 Civ. 999 (S.D.N.Y.)

16. LaRouche *v.* Kelley, 75 Civ. 6010 (S.D.N.Y.)

17. Clavir *v.* United States, 76 Civ. 1071 (S.D.N.Y.)

APPENDIX K

THE FEDERAL STATUTES CONTAINING PROVISIONS FOR NATIONWIDE SERVICE OF PROCESS

1. ***Actions under the Federal Interpleader Act, 28 U.S.C. §§ 1335, 1397, 2361:*** The *res* is within the forum and is the subject matter of the litigation. It provides a fair basis for summoning the claimants into the forum to determine their respective rights thereto. See *Shaffer* v. *Heitner, supra,* at pp. 208-09, and n. 37.

2. ***Actions seeking to assert rights in property where the defendant cannot be served within the state or does not voluntarily appear, 28 U.S.C. § 1655:*** See paragraph 1 above.

3. ***Process against the corporation in a shareholder's action, 28 U.S.C. § 1695:*** The corporation in a derivative suit is a nominal party defendant and is the real party in interest on the plaintiff side. The nominal plaintiff has on behalf of the corporation selected the forum presumably having the best reach for the real defendants in mind.

4. ***Injunction actions by the United States under Section 5 of the Sherman Act and Section 15 of the Clayton Act, 15 U.S.C. §§ 5, 25:*** In antitrust conspiracy cases additional defendants may be summoned whether or not they reside in the district but only when the court finds *"that the ends of justice require"* [emphasis ours] that they be brought in. In these cases the out-of-state defendant must be added because it is claimed that he acted in combination with the in-state defendant or defendants already before the court. The combination in violation of the antitrust

laws must, at least at one end, have been committed in the forum state pursuant to the agreement of the out-of-state defendant.

5. *Actions against corporations under the antitrust laws, 15 U.S.C. § 22:* This statute specifically limits the districts in which suit can be brought to the district whereof the corporation is an inhabitant, may be found or transacts business. In any such instance the demands of due process are met since the corporate defendant would have "minimum contacts" with each such district.

6. *Actions in which a receiver is appointed and the land or other property of a fixed character, the subject of the action, lies within different districts, process may issue and be executed in any such district, 28 U.S.C. § 1692: See* paragraph 1 above.

7. *In certain actions under the interstate commerce laws pursuant to 28 U.S.C. § 2321 and 49 U.S.C. §§ 20, 23, 43:* Section 2321 of Title 28 applies only to actions brought by the United States (28 U.S.C. § 2322) to enforce Interstate Commerce Commission orders and permits process of district courts to run nationwide. ICC orders support a nationwide structure of operations adequate to meet the *International Shoe* test. ICC regulated carriers operate under licenses which may be properly made conditional upon a submission to nationwide jurisdiction. *Slaffer* v. *Heitner, supra* at 216.

8. *Actions by a national banking association under the provisions of chapter 2 of Title 12, to enjoin the Comptroller of Currency, or any receiver acting under his direction, First National Bank of Caton* v. *Comptroller of the Currency, 252 U.S. 504 (1919); 28 U.S.C. § 1394:* Such actions are brought to enjoin a banking official of the

United States with nationwide responsibilities and, by reason thereof, such official is "present" in the district of any bank subject to the exercise of his regulatory authority.

9. *Actions against officers of the United States, 28 U.S.C. § 1391(e):* This, of course, is the subject of this petition.

10. *Actions brought in the name of the United States on bonds of contractors for public buildings or works, 40 U.S.C. § 270(b):* Such suits on construction contract bonds are authorized in the district in which the contract was to be performed and executed. One who bonds such a contract would certainly have the necessary "minimum contacts" with the jurisdicion where the contract is to be performed.

11. *Actions brought under the Securities Act of 1933 and the Securities Exchange Act of 1934, 15 U.S.C. §§ 77v(a), 78aa:* These statutes specifically limit the districts in which suit can be brought to the districts where the defendant is found, or is an inhabitant, or transacts business, or where an offer or sale of securities took place, if the defendant participated therein. In any such instance the demands of due process are met since the defendant would have "minimum contacts" with each such district.

12. *Actions under the Investment Company Act of 1940, 15 U.S.C. § 80a-43:* This statute specifically limits the district in which suit can be brought to the district where the defendant is an inhabitant or transacts business. The demands of due process are met since the defendant would have "minimum contacts" with such districts.

13. *Actions under the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79y: See* paragraph 12 above.

14. *Actions against the Secretary of Health, Education and Welfare to review benefits under the Social Security Act, 42 U.S.C. § 405(g): See* paragraph 8 above. In addition, such an action is "nominally" against the Secretary, and "in essence" against the United States.

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1546

WILLIAM H. STAFFORD, JR.,
STUART J. CARROUTH
AND CLAUDE MEADOW,

Petitioners,

v.

JOHN BRIGGS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED April 30, 1978
CERTIORARI GRANTED January 15, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1546

WILLIAM H. STAFFORD, JR.,
STUART J. CARROUTH and
CLAUDE MEADOW,

Petitioners,

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THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

CIVIL DOCKET

United States District Court for the District of Columbia

1974	Proceedings
May 28	Complaint, appearance; Jury Demand; EX. A & B. filed A.G. ser. 5-28-74; deft.#1 ser. 5-30-74.; USA ser. 5-29-74.
May 28	Summons, Copies (6) and Copies (6) of Complaint issued
June 19	AMENDMENT by pltfs to the complaint; c/m 6-18-74.
July 1	MOTION by defts. for change of venue and stay of proceedings, or in the alternative for dismissal as to the three non-resident defts. and for stay of discovery, pending the filing of a timely motion to dismiss; Exhibits A thru Q; P&A; c/m 7-1-74; appearance of Benjamin C. Flannagan as counsel.
July 1	MOTION of defts. for change of venue and stay of proceedings, including deposition of Deft. Guy Goodwin or in alternative for dismissal as to three non-resident defts. and stay of discovery including deposition of Goodwin pending filing of motion to dismiss, heard and motion of Defts. for change of venue denied without prejudice; deposition of Deft. Goodwin stayed. (OTBP) (Rep. D. Spencer) Robinson, J.
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July 22	MOTION of deft. #1 to dismiss; Exhibit A & B; P&A; c/m 7-22-74.

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July 19	ORDER granting defts. until 7-22-74 to file their answer and or motion to dismiss; Pltfs. shall reply to motions with respect to transfer by 7-19-74; staying depositon of deft. Guy Goodwin pending determination of Deft. Goodwin's claims of immunity. (N) Robinson, J.
July 29	OPPOSITION of pltffs. to motion of defts' to transfer; Exhibit A & B; c/m 7-18-74.
August 8	STIPULATION extending pltffs time to answer deft. Goodwin's motion to dismiss to and including 8-19-74. (fiat) (N) Robinson, J.
August 14	SUPPLEMENTAL Authority in support of motion of deft. #1 to dismiss; c/m 8-13.
August 19	BRIEF of pltffs' in opposition to motion of deft. #1 to dismiss; Exhibit A & B; c/m 8-16-74.
October 18	MEMORANDUM of pltffs. regarding Apton v. Wilson; c/m 10-16-74.
November 20	MEMORANDUM and Order denying deft. Guy Goodwin's motion to dismiss; denying motion of Deft. Stafford, Carrouth and Meadows to transfer. (N) Robinson, J.
December 2	MOTION by defts. to extend time to answer complaint; P&A's; c/m 12/2/74.

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December 13	MOTION of deft. #1 to dismiss and renewed motion for stay of all proceedings, including the taking of the deposition of deft. #1, or in the laterna tive for certification of the issue of immunity and for stay pending determination of interlocutory appeal; P&A; Attachment; c/m 12-13-74.

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December 10	ORDER enlarging defts' time to respond to complaint to 12-13-74. (signed 12-9-74) (N) Robinson, J.
December 18	MEMORANDUM of pltffs. in opposition to deft. Goodwins motion to dismiss and defts. renewed motion for stay of all proceedings or in the alternative for certification of the issue of immunity and for stay of all proceedings pending determination of interlocutory appeal; c/s 12-18-74.
December 18	MOTION of deft. Guy Goodwin to dismiss and renewed motion of defts. for stay of all proceedings, including the taking of the deposition of deft. Guy Goodwin; or in the alternative for certifi cation of the issue of immunity and for stay of all proceedings pending determination of interlocutory appeal, heard and taken under advisement. (Rep. Doyne W. Spencer) Robinson, J.
December 24	MOTION of defts. #2 & 3 to dismiss; P&A; c/m 12-23-74.

1975

January 10	STIPULATION extending pltfs' time to answer defts., Stafford, Carrouth & Meadows motion to dismiss till 1-20-75, so ordered. (fiat) (N) Robinson, J.
January 20	MEMORANDUM of pltffs' in opposition to motion of defts. #2, 3 & 4 to dismiss; c/m 1-17-75.
January 29	APPEARANCE of R. John Seibert as counsel for defts. William H. Stafford, Jr., Stuart J. Carrouth and Claude Meadow. CAL/N
January 29	SUPPLEMENTAL Memorandum of points and authorities in support of the alternative motion of defts. #2, 3 & 4 to dismiss action as to them; c/m 1-29-75.
March 4	ORDER dismissing action as to Defts. William H. Stafford, Jr., Stuart J. Carrouth and Claude Meadow. (N) Robinson, J.
March 4	ORDER denying deft. Goodwin's fresh motion to dismiss and motion for certification of issue of witness immunity; certifying Memorandum and Order of 11-20-74 for interlocutory appeal as to certain issue; staying proceeding pending determination of said appeal. (N) Robinson, J.

March 21	MOTION of pltffs. for stay of effective date of order of 3-4-75, dismissing the action against defts. Stafford, Carrouth and Meadow or alternatively for an order complying with Rule 54(b) FRCP to make order final and appealable and for an order staying the effective date of the dismissal order until further order of the court; Memorandum; c/m 3-20-75.
April 2	RESPONSE and Opposition by defts. Stafford, Carrouth and Meadow to pltffs' motion for stay filed 3-21-75; c/m 4-2-75.
April 4	ORDER for final judgment be entered on Order of 3-4-75 dismissing action as to defts. William H. Stafford, Jr., Stuart J. Carrouth and Claude Meadow. (N) Robinson, J.
May 5	NOTICE of Appeal by pltfs. from Order of April 4, 1975. Copy mailed to R. John Seibert. $5.00 paid and credited to U.S. by Philip J. Hirschkop.
May 28	CERTIFIED Copy of USCA Order granting motion of petitioner for leave to appeal pursuant to 28 USC 1292 (b); denying request by appellees that case receive expedited treatment. (deft. Goodwin)
June 12	RECORD on Appeal delivered to USCA; Receipt acknowledged. (USCA No. 75-1578, pltff.) (USCA No. 75-1642, deft.)

COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN BRIGGS, 4165 N.W. 12th Terrace, Gainesville, Florida;
SCOTT CAMIL, 425 N.W. 10th Avenue, Gainesville, Florida;
PETER P. MAHONEY, 348 E. 92nd Street, New York, N.Y.;
STANLEY K. MICHELSON, 4165 N.W. 12th Terrace, Gainesville, Florida;
JOHN KNIFFIN, 501 W. 12th Street, Austin, Texas;
WILLIAM PATTERSON, 103 Kingswood Road, Newark, Delaware;
ALTON FOSS, 2900 S.W. 25th Terrace, Gainesville, Florida;
DONALD PERDUE, 4560 S.W. 32nd Drive, Hollywood, Florida;
ROBERT WAYNE BEVERLY, 501 W. 12th Street, Austin, Texas;
JACK JENNINGS, 835 N.E. 3rd Avenue, Gainesville, Florida,

Plaintiffs,

vs.

GUY GOODWIN, individually and as Attorney for the Department of Justice, Division of Internal Security; WILLIAM H. STAFFORD, JR., individually and as United States Attorney for the Northern District of Florida; STUART J. CARROUTH, individually and as Assistant United States Attorney for the Northern District of Florida; and CLAUDE MEADOW, individually and as special agent of the Federal Bureau of Investigation,

Defendants.

Civil Action

JURY TRIAL REQUESTED

Complaint
(Suit for Declaratory and Injunctive Relief and Damages)

JURISDICTION

1. The jurisdiction of this Court arises under 28 U.S.C § 1331, 1332, 1343, 1651, 2201 and 2202.

2. The amount in controversy exceeds $10,000 exclusive of interests and costs, in that the value of each of the rights of which plaintiffs have been deprived is in excess of $10,000.

3. Plaintiffs' causes of action arise under the First, Fourth, Fifth, Sixth, Eighth and Ninth Amendments to the Constitution of the United States; 18 U.S.C. §§ 371, 401, 402, 1621 and 1622; 28 U.S.C. §§ 2201-02; 42 U.S.C. §§ 1983, 1985, 1986 and 1988.

4. Plaintiff JOHN BRIGGS is a resident of the State of Florida and is a member of the Vietnam Veterans Against the War/Winter Soldier Organization (hereinafter VVAW/WSO). Plaintiff BRIGGS was subpoenaed before the Federal grand jury in Tallahassee, Florida to appear on August 8, 1972 and was incarcerated for contempt of court for eight days for refusing to answer questions before the grand jury. Plaintiff BRIGGS was subsequently indicted as a co-conspirator in the superceding indictment captioned *United States v. John K. Briggs, et al.*, GCR 1353, and was acquitted of the charges therein on August 31, 1973.

5. Plaintiffs SCOTT CAMIL, STANLEY K. MICHELSON, DONALD PERDUE and ALTON FOSS are residents of the State of Florida. Plaintiff JOHN KNIFFIN is a resident of the State of Texas. Plaintiff WILLIAM PATTERSON is a resident of the state of Delaware. Plaintiff PETER P. MAHONEY is a resident of the State of New York. All of the foregoing plaintiffs are members of VVAW/WSO and were subpoenaed to appear before the Federal Grand Jury in Tallahassee, Florida in July, 1972, and with the exception of Plaintiff MICHELSON, were indicted by that Grand Jury in an indictment captioned

United States v. Camil, et al., GCR 1344. Plaintiffs were subsequently re-indicted in the superceding indictment (including Plaintiff Michelson) captioned *United States v. Briggs, et al.*, GCR 1353 (known as the Gainesville 8 Case) which totally incorporated the charges in the preceding indictment. All were acquitted of the charges against them on August 31, 1973.

6. Plaintiff JACK JENNINGS is a resident of the State of Florida. Plaintiff ROBERT WAYNE BEVERLY is a resident of the State of Texas. Both are members of VVAW/WSO and were subpoenaed before the Federal Grand Jury in Tallahassee, Florida in July, 1972. They were incarcerated for thirty-eight days for refusing to answer questions before that grand jury, and were released on September 8, 1972 on bail pending appeal pursuant to the order of Justice William O. Douglas issued on August 31, 1972. Their convictions for contempt were reversed by the United States Court of Appeals for the Fifth Circuit on September 25, 1972.

Defendants

7. Defendant GUY GOODWIN is Attorney for the Internal Security Division of the United States Department of Justice; defendant WILLIAM H. STAFFORD, JR., is United States Attorney for the Northern District of Florida; defendant STUART J. CARROUTH is Assistant United States Attorney for the Northern District of Florida; defendant CLAUDE MEADOW is a special agent of the Federal Bureau of Investigation in Gainesville, Florida and was the agent in charge of the investigation of the Gainesville 8 Case. Defendants were responsible for conducting the investigation and grand jury which resulted in

the indictments of plaintiffs BRIGGS, et al., and the incarceration of plaintiffs BEVERLY, et al., and were responsible for the prosecution of the indictment in *United States v. Briggs, et al.*

All defendants are sued both individually and in their official capacities.

STATEMENT OF FACTS

8. This is an action for declaratory relief and for damages for violations of plaintiffs' rights under the First, Fourth, Fifth, Sixth, Eighth and Ninth Amendments and for injunctive relief in the form of the appointment of a special prosecutor to prosecute the defendants for violations of law including 18 U.S.C. §§ 241, 242, 371, 401, 402 1621 and 1622.

9. Plaintiffs CAMIL, PATTERSON, MICHELSON, KNIFFIN, FOSS, PERDUE, BEVERLY, JENNINGS and MAHONEY are veterans of this nation's Armed Forces and have served in the war in Vietnam. They are also members of the VVAW/WSO. Plaintiff BRIGGS has never served in the Armed Forces, but has been and is a member of VVAW/WSO.

10. Starting on Friday, July 7 at or about 12:00 noon, in excess of twenty (20) grand jury subpoenas, most of which bore dates of issuance four days earlier, were served in a coordinated sweep upon the named plaintiffs and other members of VVAW/WSO, with the exception of plaintiff BRIGGS, who was subpoenaed a month later. The subpoenas were returnable sixty- nine (69) or less hours later, July 10, 1972 at 10:00 a.m., in Tallahassee, Florida (with a weekend intervening). They were served not only on those plaintiffs who live or had arrived in Florida, but also on VVAW/WSO members in the State of Arkansas, Texas, Louisiana, Washington, D.C.; and others. All the subpoenas were returnable at the same time, notwithstanding the

obvious impossibility of the grand jury hearing this testimony all at once. In addition, the subpoenas coincided with a VVAW/WSO anti-war march at the Democratic National Con vention in Miami, for which the organization had a permit.

11. Twenty-one (21) of the persons subpoenaed to appear before the grand jury including the plaintiffs, many of whom did not previously know each other, were represented by nine lawyers who were present at various times over the four days the grand jury was in session. Nearly all of the lawyers met their clients for the first time on or after the afternoon of July 7th. Thus, when they appeared in Tallahassee on July 10, 1972, witnesses and attorneys had known each other for less than two days and some had met the night before or morning of the grand jury. Some did not meet until the grand jury had begun.

12. During the grand jury itself, the procedures used by defendants in calling witnesses heightened the confusion, for defendants' "piggy-backed" witnesses, calling a new witness into the grand jury room to be questioned while the prior witness was out of the room consulting with his attorney for legal advice respecting his answer to the prior question.

13. On information and belief, these procedures were used by defendants to enable them to plant informants in the defense camp and to make information from the defense camp more readily available to their planted informants.

14. Because of the large number of subpoenaed witnesses, the small number of lawyers, the inadequacy of physical facilities and the procedure used by the government for calling witnesses, it was necessary during the one and a half days of preparation for the grand jury and the

four days of grand jury proceedings, to have many discussions of legal matters in groups of witnesses and attorneys.

15. As a result of the aforementioned conditions, and of the fact that VVAW/WSO was known to be heavily infiltrated by paid informers and agents of state and local police and by the Federal Bureau of Investigation, plaintiffs and the other subpoenaed witnesses made a motion before United States District Judge David L. Middlebrooks requiring defendants to disclose the identity of any agents or informers represented by enumerated counsel in order to protect the constitutional rights of plaintiffs and other witnesses represented by those counsel.

16. On the afternoon of July 12, 1972, Judge Middlebrooks requested that counsel for movants submit a list setting forth which witnesses were represented by counsel. That list, which included the names of all the plaintiffs then subpoenaed, including Emerson L. Poe, was read to the court in the presence of defendants GOODWIN, STAFFORD and CARROUTH. See Exhibit A annexed hereto and made part hereof.

17. On July 13, 1972, in response to an order of the court, defendant GOODWIN, on behalf of all defendants and with their full knowledge, falsely represented to the court under oath that none of the persons listed were agents or informers, when, on information and belief, he and the other defendants herein knew that at least one subpoenaed witness/client was a paid FBI informer and failed to disclose this fact to plaintiffs and their attorneys up until the day that informer took the witness stand in United *States v. Briggs, et al.*, (see Exhibit B annexed hereto and made a part hereof).

18. On information and belief, defendant GOODWIN'S testimony was deliberately calculated to mislead plaintiffs and to both conceal the unconstitutional invasion of the

defense camp before and during the grand jury and to ensure the continuance of that unconstitutional invasion.

19. On information and belief had the grand jury known of the aforesaid perjury they would have refused to issue the indictment requested by defendants.

20. Defendant Goodwin's false testimony was wholly beyond the scope of his prosecutorial function.

21. On July 13, 1972, plaintiffs BEVERLY and JENNINGS were held in civil contempt for failing to answer questions before the grand jury and were incarcerated for a total of 38 days.*

22. On that same evening plaintiffs CAMIL, MAHONEY, KNIFFIN, PATTERSON, FOSS and PERDUE were indicted for conspiracy to cross state lines and riot at the Republican National Convention. *United States v. Camil, et al.*, GCR 1344. Plaintiffs, with the exception of PATTERSON, were incarcerated pending their release on bail.

23. On August 7, 1972, plaintiff BRIGGS was subpoenaed to appear before the Federal Grand Jury in Tallahassee which had, less than one month before, issued the indictment in *United States v. Camil, et al.* On information and belief, that subpoena was issued in part as a result of information obtained by defendants from EMERSON L. POE during and after the grand jury proceedings in July.

* Beverly and Jennings were originally incarcerated for civil contempt without bail on July 13, 1972. On July 18, 1972, in an emergency appeal on denial of bail, the Fifth Circuit summarily remanded the matter to District Court, directed the Court to hold a full hearing and enlarged plaintiffs pending the hearing.

On August 9, 1972, after a brief hearing, they were once again remanded to custody without bail and remained incarcerated until September 8, 1972, eight days after Associate Justice William O. Douglas granted their application for bail pending appeal and ordered their release.

Such information was obtained as a result of the aforementioned perjury.

24. On August 8, 1972, plaintiff BRIGGS' subpoena was adjourned and he was ordered to reappear on September 7, 1972. On September 8, 1972 plaintiff BRIGGS was held in civil contempt for refusing to answer questions before the grand jury and was incarcerated and held without bail until September 15, 1972 when he was released by the Fifth Circuit in response to an *ex parte* motion by the defendants to dismiss the appeal since they intended to withdraw the contempt.

25. On October 18, 1972, the grand jury issued a superceding indictment incorporating all of the charges against plaintiffs CAMIL, MAHONEY, KNIFFIN, PATTERSON, FOSS and PERDUE in the prior indictment and indicting plaintiff BRIGGS as a co-conspirator and plaintiff MICHELSON for aiding and abetting the conspiracy and for misprison of a felony. On information and belief the new information and the re-indictment were obtained by defendants as a result of the invasion of the defense camp by defendants' agent, EMERSON L. POE. The trial of those charges began on July 31, 1973.

26. On August 17, 1973, in mid-trial, plaintiffs learned for the first time that EMERSON L. POE, one of the persons named on the aforementioned list of witness-clients, was at the time of defendant GOODWIN'S testimony a paid Federal Bureau of Investigation informant and had been such for more than six months prior to that time, reporting directly to defendant MEADOW each and every time he spoke with or saw plaintiff CAMIL and, on information and belief, the other plaintiffs, during and after the grand jury.

27. POE continued to be a paid informer after plaintiffs were released from the grand jury up to and during their

criminal trial. He continued to maintain close personal and organizational contact with plaintiff CAMIL and other plaintiffs, solicited and passively received information concerning the defense, and continued to report to defendant MEADOW concerning each contact he had with plaintiff CAMIL.

28. On information and belief, these contacts between informer POE and the plaintiffs were maintained with the knowledge and direction of the defendants.

29. As a direct result of defendant GOODWIN'S false testimony, EMERSON L. POE remained in a position of trust amongst the plaintiffs and remained privy to information concerning plaintiffs' defense in *United States v. Briggs, et al.* up to August 17, 1973, when he appeared on the witness stand as a government witness.

30. During that time, and as a direct result of defendant GOODWIN'S false testimony, POE was consulted by plaintiff CAMIL concerning matters directly relating to plaintiffs' defense in *United States v. Briggs, et al.*, including matters pertinent to the selection of the jury in that case, had access to defendants' (plaintiffs herein) mailbox which received legal mail concerning the case throughout pre-trial preparations and was permitted to attend at least one strategy meeting of the defendants.

31. On information and belief, defendant GOODWIN'S false testimony was designed to and did result in invading the defense camp of plaintiffs and their attorneys in such a fashion as to:

a) deprive plaintiffs of their right to counsel before the grand jury and through the trial of *United States v. Briggs, et al.*;

b) incarcerate plaintiffs in violation of their rights to be free of cruel and unusual punishment as guaranteed by the Eighth Amendment;

c) force plaintiffs CAMIL, MICHELSON, FOSS, PERDUE, KNIFFIN, MAHONEY, PATTERSON and BRIGGS to defend themselves in a five week trial under an indictment that was so totally tainted as to violate their rights to due process under the Fifth Amendment and their right to counsel under the Sixth Amendment;

d) totally disrupt the lives of plaintiffs and deprived them of liberty and property by causing them to lose their jobs and/or forcing them to give up their schooling and jobs for varying periods of time up to and including 1-1/2 years in order to prepare for and finance their defense and caused them the intense pain and suffering of having their lives so totally disrupted;

e) violate the Fifth and Sixth Amendment rights of plaintiffs CAMIL, MICHELSON, FOSS, PERDUE, KNIFFIN, MAHONEY and BRIGGS by placing in their confidence during the entire period of the grand jury and trial preparations up to and including the first weeks of trial, a paid FBI informer who was privy to the closest confidence of the plaintiffs concerning trial preparations and strategy as a result of defendant GOODWIN'S sworn assurance that none of the enumerated persons were informers;

f) violate plaintiff CAMIL'S rights guaranteed by the First and Ninth Amendments to privately associate with other persons free of the eyes, ears, and influence of the state functioning under the cloak of sworn governmental assurances that his associates are not government informers;

g) violate plaintiffs' rights to substantive due process guaranteed by the Fifth Amendment.

32. On information and belief, at least one or more other persons included in the list presented to the Court and to defendants were also government informants.

33. On information and belief, defendants were aware of and deliberately concealed the fact the POE and other witnesses represented by enumerated counsel were government informants at the time of defendant GOODWIN'S testimony and continued to conceal such throughout and until the day that informer POE took the witness stand in the trial of *United States v. Briggs, et al.*

34. On information and belief, defendants conspired together and with EMERSON L. POE and others unknown to plaintiffs and determined to deprive plaintiffs of their constitutional rights under the First, Fourth, Fifth, Sixth, Eighth and Ninth Amendments by deliberately concealing information concerning invasion of the defense camp, falsely stating under oath that none of the persons represented by plaintiffs' counsel were government informers, and directing POE to remain in the confidence of plaintiffs and continue violating plaintiffs' rights under the Constitution.

35. On information and belief other agents and informants of defendants in addition to Mr. POE invaded the defense camp between July 7, 1972 through and until the acquittal in the trial of *United States v. Briggs, et al.*, on August 31, 1973, in violation of plaintiffs' aforesaid constitutional rights.

36. On information and belief, the violation of the aforementioned statutes by defendants GOODWIN, STAFFORD, CARROUTH and MEADOW are known to persons

in the Department of Justice but no prosecutions have begun.

37. As defendants STAFFORD and CARROUTH are in control of recommending and securing indictments in the Northern District of Florida, the appointment of a special prosecutor is required.

WHEREFORE, plaintiffs respectfully request that the following relief be granted:

1) That this Court issue a declaratory judgment that as a result of the actions of defendants knowingly planting or keeping one or more informants in the defense camp,

a) plaintiffs' rights under the First, Fourth Fifth, Sixth, Eighth and Ninth Amendments were violated;

b) plaintiffs were incarcerated in violation of their rights under the Fifth, Sixth and Eighth Amendments;

c) plaintiffs CAMIL, MICHELSON, PERDUE, FOSS, MAHONEY, KNIFFIN, PATTERSON and BRIGGS were unnecessarily and wrongfully required to defend themselves against criminal charges in violation of their constitutional rights and denied the right to counsel under the Sixth Amendment.

d) plaintiffs, and particularly plaintiff CAMIL, were deprived of their rights under the First and Ninth Amendments to associate with persons of their choosing free of false statements that those persons are not government agents or informers.

2) Order that defendants pay to plaintiffs and each of them $100,000 in punitive damages and $50,000 in compensatory damages;

3) Order that defendants reimburse plaintiffs CAMIL, MICHELSON, FOSS, PERDUE, KNIFFIN, MAHONEY, PATTERSON and BRIGGS for the cost of their legal defense in the case of *United States v. Briggs, et al.*;

4) That a special prosecutor be appointed to secure indictments against and prosecute defendants GOODWIN, STAFFORD, CARROUTH and MEADOW for any and all violations of the law they have committed in connection with the subpoenaing and incarceration and prosecution of plaintiffs herein.

Respectfully submitted,

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503 D Street, N.W.
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Attorneys for Plaintiffs

Dated: New York, N.Y.
May , 1974

VERIFICATION

PETER P. MAHONEY, being duly sworn, deposes and says: I am one of the plaintiffs in the action herein. I have read the foregoing complaint and hereby verify that to the best of my knowledge, all that is contained therein is true.

/s/_____
PETER P. MAHONEY

Sworn to before me this
21st day of May, 1974

/s/_____

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

In Re:
Grand Jury Witnesses. T-Misc-No. 1/122

CAPTION

The above-entitled matter came on to be heard before the Honorable DAVID L. MIDDLEBROOKS, United States District Judge, at the U.S. Post Office Building, Tallahassee, Florida, on the 12th day of July, 1972, commencing at 3:50 o'clock P.M.

APPEARANCES

STEWART J. CARROUTH, Assistant United States Attorney, and STARK KING, Assistant United States Attorney, U.S. Post Office Building, Tallahassee, Florida, and GUY GOODWIN, Assistant United States Attorney, U.S. Post Office Building, Tallahassee, Florida, and WILLIAM STAFFORD, United States Attorney, U.S. Post Office Building, Pensacola, Florida, appearing on behalf of the Government.

CAMERON CUNNINGHAM, 502 West 15th Street, Austin, Texas, 78701, appearing on behalf of the Grand Jury Witnesses.

DORIS PETERSON, 588 9th Avenue, New York, New York, 10036, appearing on behalf of the Grand Jury Witnesses.

NANCY STEARNS, 588 9th Avenue, New York, New York, 10036, appearing on behalf of the Grand Jury witnesses.

JAMES REIF, 588 9th Avenue, New York, New York, 10036, appearing on behalf of Grand Jury Witnesses.

JUDITH PETERSEN, 115 South Main Street, Gainesville, Florida, 32601, appearing on behalf of Grand Jury Witnesses.

EDWARD C. BROEGE, 108 Washington Street, Newark, N. Jersey, 07102, appearing on behalf of Grand Jury Witnesses.

Reported By
Jerry L. Rotruck
Federal Court Reporter
P.O. Box 928
Tallahassee, Florida
224-0722

MR. LEVINE:

Now, the names of the witnesses are as follows.

Wayne Beverly, John Chambers, Timothy Jones, James Hall, John Kniffen, Arthur Franz, Nancy McCown, Jack Jennings, Bruce Horton, Richard Hudgens, Don Donner, Marty Jordan, Bruce Logston, Stanley Michelson, Donald Perdue, Pete Mahoney, Scott Camile, Emerson Poe, and I believe there is – I guess that is it. Some of the – Miss Peterson asked me to make one correction. We have talked on a one to one basis or two to one basis with some of those who have not literally yet been called, and I hope Your Honor will bear in mind that we never saw these people before. They never saw us. They arrived here with no lawyers.

Now, myself – well, Mr. Beverly was represented in Texas by Mr. Cunningham and Mr. Cunningham is representing him in these proceedings with my assistance.

Mr. Chambers is represented by Miss Judy Petersen.

Mr. Jones was counseled by myself and Miss Petersen.

Mr. Hall was counseled – I would like the Court to bear in mind that we were originally asked to represent these people as best we could and there has been some inner consultation between lawyers, but for the purpose of trying to make sure that they knew who had primary responsibility, this is how it has worked.

James Hall, Miss Stearns.

John Kniffen, Mr. Cunningham and myself.

Mr. Arthur Franz was here at one point and he came – he asked for my counsel and I remember having some conversation with him about the nature of the proceedings.

Nancy McCown, Judy Petersen.

Jack Jennings, Doris Petersen and Miss Stearns.

Mr. Hall is, Miss Stearns informs me, is both herself and Doris Peterson.

Bruce Horton, Mr. Reif.

Richard Hudgens, Mr. Cunningham and myself.

Mr. Donner, Mr. Cunningham and myself.

Mr. Jordan, Mr. Cunningham and myself.

Bruce Logston, Mr. Broege, although he has been consulting, Mr. Broege just arrived and he has been – many of these witnesses, let me explain, have been coming up to many of us and asking questions and that was the nature of the original understanding between the lawyers and the witnesses, so when I mentioned these specific names, it is not to indicate that they are the only lawyers who have counseled with them, but this has been when the people have actually been called into the Grand Jury Room, we have tried as best as possible, given the fact that everybody was out in the hallway until we were able to move into the Courtroom, and people were wondering all around, to get together with these people on an individual basis, much like a – well, I will not go on.

Mr. Michelsen, Mr. Broege.

Mr. Perdue, Mr. Broege.

MR. GOODWIN:

Just a second. All right.

MR. LEVINE:

Mr. Mahoney, Mr. Broege.

Mr. Camile, Miss Judy Petersen, and I have just been informed that Mr. Poe, who I believe originally was not represented by counsel –

MISS DORIS PETERSON:

Just for the Sixth Amendment motion that Your Honor ruled on the other day.

MR. LEVINE:

Now, many of these witnesses – I am sorry. Mr. Reif and Doris Peterson.

MR. STAFFORD:

Was this Poe?

MR. LEVINE:

I would ask other counsel if they have any corrections.

MR. CUNNINGHAM:

Mr. Patterson was inadvertently excluded from the list of witnesses.

MR. LEVINE:

I am sorry. Mr. Cunningham.

THE COURT:

That was Mr. Patterson?

MR. CUNNINGHAM:

Yes.

MR. LEVINE:

Yes, William Patterson.

MISS JUDY PETERSEN:

Also, Your Honor, this morning Mr. Allen was here and so I believe Mr. Philip Parsons from here in Tallahassee said that Mr. Allen had talked to him. I am not certain of his situation, but I would not represent to this Court that he does not have counsel. I believe he is talking to local counsel.

MR. LEVINE:

Now, I would ask if there are any of the other attorneys that have anything to add to that, that they do so. Mr. Novey represents Alton Foss.

MR. GOODWIN:

Who?

MR. LEVINE:

Mr. Jerome Novey. He is a local attorney from Tallahassee.

MISS JUDY PETERSEN:

Your Honor, Mr. Scott Camile, he has counsel in Gainesville, Larry Turner that I have been working with trying to work closely with on the phone. He has been unable to get up here at this time.

THE COURT:

Well, he is represented by counsel here, though?

MISS JUDY PETERSEN:

Yes, sir.

MR. LEVINE:

Now, these – let me say one further word. As we explained to the Court originally, all of these people were informed of the possibility of conflicts in representation developing and –

THE COURT:

Now, let me ask you something here. This bothers me, and I wish you would explain it to me.

As I understand it, essentially, the representation by counsel of witnesses before a Grand Jury is for the purpose of advising that witness whether any information that he may give to the Grand Jury might tend to incriminate him, is that correct?

MR. LEVINE:

That is certainly one aspect of it.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

IN RE: GRAND JURY WITNESSES
CASE NO. T MISC. 1/122

CAPTION

The above-entitled matter came on to be heard before the Honorable David L. Middlebrooks, United States District Judge, at the U.S. Post Office Building, Tallahassee, Florida, on the 13th day of July, 1972, commencing at 10:37 A.M.

APPEARANCES

JAMES REIF, NANCY STERNS, DORIS PETERSON, and JACK LEVINE, 588 Ninth Avenue, New York, New York 10036, appearing on behalf of the Grand Jury witnesses. CAMERON CUNNINGHAM, 502 West Fifteenth Street Austin, Texas 78701, appearing on behalf of the Grand Jury witnesses.

JUDY PETERSEN, 115 South Main Street, Gainesville, Florida 32601, appearing on behalf of the Grand Jury witnesses.

STEWART J. CARROUTH, Assistant United States Attorney, WILLIAM STAFFORD, United States Attorney, GUY GOODWIN, Assistant States Attorney, and STARK KING, Assistant United States Attorney, U.S. Post Office Building, Tallahassee, Florida, appearing on behalf of the Government.

Reported by
JERRY L. ROTRUCK
FEDERAL COURT REPORTER
P. O. BOX 928
TALLAHASSEE, FLORIDA
224-0722

that under these circumstances Mr. Goodwin ought to submit an affidavit under oath explaining stating there are no informants and explaining the basis on which he –

THE COURT:

Mr. Goodwin, take the witness stand. Swear the witness, Mr. Clerk.

Whereupon,

GUY GOODWIN was called as a witness, having been first duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE COURT:

Mr. Goodwin, are any of these witnesses represented by counsel agents or informants of the United States of America?

THE WITNESS:

No, Your Honor.

THE COURT:

You can step down.

(Witness excused.)

MR. LEVINE:

Your Honor, may we be permitted to question Mr. Goodwin on this?

THE COURT:

No, unless you have some information that is

(Caption Omitted)

AMENDMENT TO COMPLAINT

The plaintiffs hereby amend their complaint. The request for relief beginning on page 11 is amended to read as follows: WHEREFORE, plaintiffs respectfully request that the following relief be granted:

1. That this Court issue a declaratory judgment that

a) as a result of the actions of defendants knowingly planting or keeping one or more informants in the defense camp,

1) plaintiffs' rights under the First, Fourth, Fifth, Sixth, Eighth and Ninth Amendments were violated;

2) plaintiffs were incarcerated in violation of their rights under the Fifth, Sixth and Eighth Amendments;

3) plaintiffs CAMIL, MICHELSON, PERDUE, FOSS, MAHONEY, KNIFFIN, PATTERSON and BRIGGS were unnecessarily and wrongfully required to defend themselves against criminal charges in violation of their constitutional rights and denied the right to counsel under the Sixth Amendment.

4) plaintiffs, and particularly plaintiff CAMIL, were deprived of their rights under the First and Ninth Amendments to associate with persons of their choosing free of false statements that those persons are not government agents or informers.

b)the false testimony given by the defendant GOODWIN was beyond the scope of his prosecutorial

function, and violated plaintiffs' rights under the Fifth Amendment.

2. Order that defendants pay to plaintiffs and each of them $100,000 in punitive damages and $50,000 in compensatory damages;

3. Order that defendants reimburse plaintiffs CAMIL, MICHELSON, FOSS, PERDUE, KNIFFIN, MAHONEY, PATTERSON and BRIGGS for the cost of their legal defense in the case of *United States v. Briggs, et al.*;

4. That a special prosecutor be appointed to secure indictments against and prosecute defendants GOODWIN, STAFFORD, CARROUTH and MEADOW for any and all violations of the law they have committed in connection

with the subpoenaing and incarceration and prosecution of plaintiffs herein.

Respectfully submitted,

/s/

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Attorneys for Plaintiffs

Dated: New York, N.Y.
June 18, 1974

(Caption Omitted)

MOTION BY DEFENDANTS FOR CHANGE OF VENUE AND STAY OF PROCEEDINGS, INCLUDING THE DEPOSITION OF DEFENDANT GUY GOODWIN; OR, IN THE ALTERNATIVE, FOR DISMISSAL AS TO THE THREE NON-RESIDENT DEFENDANTS AND FOR STAY OF DISCOVERY, INCLUDING THE DEPOSITION OF THE RESIDENT DEFENDANT GUY GOODWIN, PENDING THE FILING OF A TIMELY MOTION TO DISMISS ON THE DEFENSE OF IMMUNITY FROM SUIT AND THE COURT'S RULING THEREON

Come now the defendants, by their undersigned attorneys, and on behalf of non-resident defendants Stafford, Carrouth and Meadow, respectfully move this Court, pursuant to the provisions of 28 U.S.C. §1406, to transfer this action to the United States District Court for the Northern District of Florida. In addition, the defendant Goodwin, by his undersigned attorneys, pursuant to the provisions of 28 U.S.C. §1404, respectfully moves that the Court transfer this civil action to the United States District Court for the Northern District of Florida. In addition, all said defendants, pursuant to the provisions of Rules 6(b) and 26(c), Federal Rules of Civil Procedure, respectfully request that the Court stay all proceedings in this cause, including the deposition of defendant Goodwin, now noticed for July 2, 1974 and the defendants' response to the complaint herein as amended, pending the Court's ruling on defendants' motions aforesaid, and if granted, pending further order of the United States District Court for the Northern District of Florida. In the alternative, defendants Stafford, Carrouth and Meadow, pursuant to the provisions of Rule 12(b)(2), (3), (4) and (5), respectfully move this Court to dismiss this action as to them for lack of jurisdiction over their persons, improper venue, insufficiency of process and

insufficiency of service of process and defendant Goodwin respectfully moves that his deposition and all further discovery in this action be stayed pending the filing of a timely motion to dismiss on the defense of immunity from suit and the Court's ruling thereon.

In support hereof, the Court's attention is respectfully invited to Defendants' Exhibits A through Q attached hereto and to defendants' memorandum of points and authorities filed herewith.

Respectfully submitted,

HENRY E. PETERSEN
Assistant Attorney General

EDWARD S. CHRISTENBURY
Attorney, Department of Justice

BENJAMIN C. FLANNAGAN
Attorney, Department of Justice
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Telephone: 202/739-3032
Attorneys for Defendants

IN THE

Supreme Court of the United States

October Term, 1977

No. 1546

WILLIAM H. STAFFORD, JR., STUART J. CARROUTH and CLAUDE MEADOW,
Petitioners,

—v.—

JOHN BRIGGS, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CASES AND AUTHORITIES

United States Constitution

Statutes and Other Authorities

OPPOSITION TO PETITION FOR CERTIORARI

COUNTER STATEMENT OF FACTS

This is an action for declaratory relief and for damages for violation of respondents' constitutional and civil rights in connection with the grand jury proceedings, T/Misc. 1/122 and 1/126 (N.D. Fla.), indictment captioned United States v. Camil, GCR 1344 (N.D. Fla.) and superceding indictment and trial in United States v. Briggs, GCR 1353 (N.D. Fla.)[1/]

1/ Respondents are the plaintiffs in the case sub judice. Eight of them were defendants in the criminal case, United States v. Briggs, supra, and were found not guilty after a jury trial. The other two respondents were held in contempt for refusing to answer questions before the grand jury and their convictions were reversed on appeal. Beverly v. United States, 468 F.2d 732 (5th Cir., 1972). See also United States v. Briggs, 514 F.2d 794 (5th Cir., 1975). Petitioners are three of the four defendants in the civil action Briggs, et al. v. Goodwin, et al. Their co-defendant, Guy Goodwin, is not a party to this proceeding. In this brief to avoid confusion, the parties to this proceeding will be referred to whenever possible only as petitioners or respondents. Goodwin, the petitioner in the companion case Goodwin v. Briggs, No. 77-1401 will be referred to as defendant Goodwin.

The three petitioners together with defendant Goodwin are being sued for actions by them under color of law and in their official roles as federal government employees but beyond the scope of their authority.[2/] The gravamen of this action is that petitioners conspired together with defendant Goodwin, an attorney for the Department of Justice, to inter alia conceal the presence of one or more informer among grand jury witnesses in the defense camp in United States v. Briggs, supra, and that petitioners' actions violated respondents' rights under the First, Fourth, Fifth, Sixth, Eighth and Ninth Amendments.

More specifically respondents have alleged that in July, 1972, petitioners Stafford (a United States Attorney), Carrouth

2/ The complaint and amendment to complaint are printed in the appendix to the brief in opposition to petition for certiorari in the companion case Goodwin v. Briggs, supra (No. 77-1401, App. 1a-43a).

(an Assistant United States Attorney), and Meadow (the FBI agent in charge of the matter) together with defendant Goodwin (an attorney for the Department of Justice, Division of Internal Security) were investigating the Vietnam Veterans Against the War/Winter Soldier Organization (hereinafter VVAW) before a federal grand jury in Tallahassee, Florida and had subpoenaed respondents along with other VVAW members from such widely scattered and far away places as Arkansas, Texas, Louisiana and Washington, D.C., requiring them on less than three days notice to appear before the Florida grand jury.

Respondents further allege that petitioners conspired together with defendant Goodwin and concealed defendant Goodwin's perjury in order to continue to have one or more paid FBI undercover agent in the defense camp, continuing such concealment

throughout the trial in United States v. Briggs, supra, ¶33, Complaint, Appendix No. 77-1401, p. 21a.

During the period between defendant Goodwin's false testimony on July 13, 1972, and Mr. Poe's surfacing as a government informer on the witness stand in the trial of United States v. Briggs, supra, on August 17, 1973, Mr. Poe testified he reported to petitioner Meadow after each occasion that he saw or spoke with respondent Camil, including every day respondents were before the grand jury.[3/] Thus, as a direct result of defendant Goodwin's perjury, the defense camp in United States v. Briggs, supra, was invaded by at least one paid FBI informer in violation of respondent's rights

3/ Petitioner Meadow was in charge of the FBI investigation on the case and worked with defendant Goodwin and petitioners Stafford and Carrouth before, during and after the grand jury period and throughout the trial.

under the First, Fourth, Fifth, Sixth, Eighth and Ninth Amendments.

Defendant Goodwin, whose official residence is in Washington, D.C., was personally served with the summons and complaint. The petitioners (Stafford, Carrouth and Meadow) were all federal employees with offices in Florida when this action was commenced and when they were served by certified mail in accordance with 28 U.S.C. §1391(e).

All of the defendants moved for a transfer or change of venue to the United States District Court for the Northern District of Florida, or, in the alternative, for a dismissal as to petitioners Stafford, Carrouth and Meadow for a lack of jurisdiction over their persons, improper venue, and insufficiency of process.

On November 20, 1974 the District Court denied the motion to transfer venue

(Petition for Certiorari Appendix 20a-24a) (hereinafter Pet. App.) but on March 4, 1975, dismissed the action against the petitioners Stafford, Carrouth and Meadow ruling that despite 28 U.S.C. §1391(e), the District Court lacked venue and in personam jurisdiction with respect to them (Pet. App. 25a-26a). A final judgment of dismissal was entered as to petitioners Stafford, Carrouth and Meadow (Pet. App. 27a).[4/]

On appeal, the Court of Appeals for the District of Columbia Circuit reversed the dismissal, holding that the plain language of 28 U.S.C. §1391(e) provided jurisdiction and venue in this case. The court

4/ Defendant Goodwin's motion to dismiss on the grounds of prosecutorial immunity was denied by the District Court (Pet. App. 20a-24a). The Court of Appeals having accepted certification affirmed (No. 77-1401, App. 1a-38a). On June 19, 1978, this Court denied defendant Goodwin's Petition for Certiorari in Goodwin v. Briggs, supra.

rejected the claim that as applied the statute violated the defendant's constitutional rights. (Pet. App. 1a-19a). The Circuit denied a petition for rehearing (Pet. App. 29a) and en banc denied the suggestion for rehearing en banc (Pet. App. 30a), but allowed petitioners to lodge documents with the court (Pet. App. 29a).

REASONS FOR DENYING THE WRIT

I. THE PETITIONERS ARE SEEKING A JUDICIAL AMENDMENT OF CLEAR AND UNAMBIGUOUS STATUTORY LANGUAGE.

The decision of the court below is a straightforward and obvious application of the plain language of the statute. Petitioner's objections to the statute relate to legislative determinations clearly within the power of Congress. Such objections were made when the statute was being considered and were rejected.

The petitioners do not contend that

statute is ambiguous or imprecise. In fact, the statute, with absolute clarity, applies to the instant case.

Rather, petitioners argue that Congress did not realize when it enacted the statute that there would be an increase in suits against federal officials as a result of this Court's subsequent decision in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) and the erosion of the absolute immunity doctrine as concerns federal officials. Accordingly, petitioners urge that since the venue provisions of the statute are more burdensome upon federal employees than the Congress might have anticipated, it should be amended by this Court so as to eliminate, in damage actions, personal jurisdiction acquired by the service of process as specified in §1391(e). This argument by its very nature should be addressed to the Congress not to the court, for in

the absence of ambiguity the plain language of the statute must govern. See Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 465 (1968); Lewis v. United States, 92 U.S. 618, 621 (1875).

Beyond that however, a study of the legislative history shows that the argument being made by petitioners to this Court was clearly presented to the Congress - and just as clearly rejected. It appears that as the bill was going through the Congress, the Department of Justice sought to eliminate the inclusion therein of actions against officials for money damages. But the Congress specifically rejected that proposed limitation. The discussion of the legislative history in the opinion of the Court of Appeals (Pet. App. 6a-9a) sets this forth clearly.

Litigation against federal officials may very well have increased since 1962.

But both the Department of Justice at the time and the Congress were fully aware of the concern about the extension of the venue provisions in respect to damage actions. As the Court of Appeals pointed out, a letter on this point was written by Assistant Attorney General (now Justice) Byron White seeking clarification of the bill to eliminate damage actions from its scope. (Pet. App. 8a); that proposal was rejected.[5/] Indeed, the Senate Committee

5/ In a very recent decision of the Court of Appeals for the First Circuit, Driver v. Helms, (No. 77-1482, May 25, 1978) (Opposition to Petition for Certiorari, Appendix A, 1a-20a), (hereinafter Opp. App.) which deals with the very same issues here involved, the First Circuit, in agreeing with the Court of Appeals' decision in the instant case referred to this letter and said:

> At minimum this letter demonstrates that Congress was on notice that personal damage actions against government officials were possible, contrary to appellants' argument that due to broad immunity under the doctrine of Barr v. Mateo, 360 U.S. 561 (1959), and because Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), was not yet decided, Congress would not have been thinking of such actions, Id., Opp. App. 12a, fn. 19.

report was very clear as to what the Congress sought to achieve:

> The venue problem also arises in an action against a government official seeking damages from him for actions which are claimed to be without legal authority, but which were taken by the official, in the course of performing his duty. S. Rep. No. 1992, 87th Cong. 1st Sess. (1962) U.S. Code Cong. and Admin. News, p. 2786.

Immediately after the statute was enacted (long before Bivens and the asserted erosion of immunity holdings) the Department of Justice made clear that it understood that the new statute applied to damage actions, i.e., that the Department had not prevailed before the Congress. In a "Memorandum for all United States Attorneys" dated January 18, 1963, the Department said:

> "The venue provision is applicable against government officials and agencies for injunctions and damages as well as suits for mandatory relief. By including in the

> venue provision the phrase 'or under color of legal authority' the statute makes the expanded venue applicable not merely to actions for mandatory relief but also to actions in which the defendant government official is alleged to have taken or is threatening to take action beyond the scope of his legal authority although purporting to act in his official capacity."6/ (underlining supplied by Department of Justice)

Thus, the Department of Justice tried and failed to persuade Congress not to pass §1391(e) as enacted. Shortly after the law was passed, it acknowledged that fact. Now petitioners turn to the Court and, though recognizing the absolute clarity of the language, seek a legislative revision by the Court. But Article III of the Constitution clearly relegates to Congress the task of defining the scope of

6/ The document referred to was submitted by the petitioners to the Court of Appeals in this case with a "Motion to Lodge Documents" filed with a Petition for Rehearing.

the jurisdiction of the federal courts.7/

Only recently the Court after observing that "Congress has spoken in the plainest of words," Tennessee Valley Authority v. Hill, ____U.S.____, 46 L.W. 4673, 4684 (June 15, 1978) emphasized that: "once the meaning of the enactment is discerned and its constitutionality determined, the judicial process comes to an end", Ibid.

That perception of the roles of the courts as part of a tri-partite system of government is applicable to this case.

In addition to their argument that §1391(e) did not extend to damage actions,

7/ Alterations of the jurisdiction of federal courts are constantly the subject of Congressional consideration. Thus, at this very time Congress has before it bills to eliminate diversity of citizenship as a basis for federal jurisdiction (S. 2389, H.R. 9622, 95th Congress). Furthermore, the statute here at issue, 18 U.S.C. §1391(e), was amended by Congress as recently as October 21, 1976, P.L. No. 94-57432, 90 Stat. 2721-2722. The amendment does not bear on the questions here presented and did not add language excluding damage actions from its application.

petitioners contend that the statute is limited to suits which, prior to its enactment, could have been brought only in the District of Columbia (Petition for Certiorari, p. 11). Nothing in the statute so limits its impact as to damage actions. It is true that as to mandamus actions, ¶(a) of the 1962 act (now 28 U.S.C. §1361) extended jurisdiction to all federal courts to deal with such actions, instead of such proceedings being limited as theretofore to the District of Columbia. It may well be that Congress, while expanding the number of courts in which mandamus actions could be brought, had no intention of changing the limited nature of the mandamus remedy and expanding either the ministerial-discretionary rule or the clear-duty-to-act rule. But there is absolutely nothing in the language of the statute or its history from which one can conclude

that insofar as the statute affected damage actions (by its provisions in respect to venue and personal service) it would be limited to such damage cases as could previously have been brought in the District of Columbia. So to argue would mean that the statute's obvious intention to permit damage actions at the greater convenience of citizen plaintiffs would be frustrated by an interpretation wholly inconsistent with the statute's objectives.

II. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS WITH RESPECT TO THE ISSUES IN THIS CASE.

There are two circuits which have dealt squarely with the issues in this case, i.e., the Court of Appeals for the District of Columbia Circuit in the instant case (Pet. App. 1a-19a), and the First Circuit in Driver v. Helms, (Opp. App. 1a-20a).

Insofar as concerns the issues in this case, both Circuits are wholly in accord. Additionally, the Fifth Circuit in Ellinburg v. Connett, 457 F.2d 240 (1972), made a decision which, though not so fully spelled out, seems to be in accord with that of the First Circuit and the District of Columbia Circuit and in conflict with Sigler v. Levan, No. 77-CA-35 (W.D. Tex. 3/22/78) (Pet. App. I, pp. 37a-49a) relied on by petitioners.[8/] (Pet. for Cert., p. 11).

Petitioners contend that there are conflicting decisions of the Second and Ninth Circuits. That is simply not so.

8/ The District Court in Sigler v. Levan, supra, does not follow Ellingburg v. Connett, supra. Furthermore, the court was unaware of the ruling in the District of Columbia Circuit in the case at bar, although it had come down six months before the Sigler opinion was handed down. The Fifth Circuit will not have an opportunity to consider Sigler in the light of Ellinburg as Sigler was not appealed and has been transferred, upon the consent of all parties, to the District of Maryland.

Thus, Rudick v. Laird, 412 F.2d 16 (2nd Cir., 1969), was a habeas corpus case where jurisdiction is necessarily based on the location of the res - the body of the persons involved; Marsh v. Kitchen, 480 F.2d 1270 (2nd Cir., 1973), did not involve §1391(e) in any way, it dealt exclusively with the New York long arm statute; Smith v. Campbell, 450 F.2d 829 (9th Cir., 1971), like Rudick, involved a habeas corpus proceeding; National Resources Defense Council v. TVA, 459 F.2d 255 (2nd Cir., 1972), involved suits against the TVA and its officers which are governed by a separate statute (§8a of the TVA Act); and Liberation News Service v. Eastland, 426 F.2d 1379 (2nd Cir., 1970), merely held that §1391(e) did not apply to legislative employees.

Furthermore, the Second Circuit in Liberation News Service v. Eastland, supra,

426 F.2d at 1382, said by way of dictum that if §1391(e) were applicable, it would supply both venue and personal jurisdiction.

Since petitioners claim that the Second Circuit is in conflict with the First and District of Columbia Circuits, attention should be called to Kletschka v. Driver, 411 F.2d 436 (2nd Cir., 1969), which in a damage action against state and federal employees seems to be a holding en passant in accord with the position of the court below.

Powers v. Mitchell, 463 F.2d 212 (9th Cir., 1972), which like most of the cases cited by petitioner does not involve the question of a suit for damages says only that §1391(e) does not apply to a local federal agency such as a selective service board. 9/

9/ It should be noted that the other cases relied upon by petitioners are District Court rulings
(Fn. continued next page)

(Footnote continued from preceding page)

which were not appealed. E.g., Bertoli v. The Securities and Exchange Commission, 77 Civ. 1450 (S.D.N.Y. 1/4/77) (where plaintiff was pro se), Kipperman v. McCone, 422 F. Supp. 860 (N.D. Cal., 1976), and Rimar v. McCowan, 374 F.Supp. 1179 (E.D. Mich. 1974). Other courts are in agreement with the court below that §1391(e) is "a statute of the United States" which generally authorizes extra-territorial service of process within the meaning of Rule 4(f), and thus supplies personal jurisdiction over non-resident defendants. Ashe v. McNamara, 355 F.2d 277, 279 (1st Cir. 1965); Lowenstein v. Rooney, 401 F. Supp. 952, 961-62 (E.D. N.Y. 1975); United States v. MacAnich, 435 F. Supp. 240 (E.D.N.Y. 1977); Crowley v. United States, 388 F. Supp. 981, 987 (E.D. Wisc. 1975); Environmental Defense Fund, Inc. v. Froehlke, 348 F. Supp. 338, 364 (W.D. Mo. 1972), aff'd. on other grounds, 477 F. 2d 1033 (8th Cir., 1973); English v. Town of Huntington, 335 F. Supp. 1369, 1373 (E.D.N.Y. 1970); Maceas v. Finch, 324 F. Supp. 1252, 1254-55(N.D. Cal. 1970); Brotherhood of Locomotive Engineers v. Denver and R.G.W.R. Co., 290 F. Supp. 612, 615-16 (D. Col. 1968), aff'd. 411 F. 2d 1115 (10th Cir. 1969) and Powelton Civic Home Owners Ass'n. v. Department of Housing and Urban Renewal, 284 F. Supp. 809, 834 (E.D. Pa. 1968).

III. THERE IS NO CONSTITUTIONAL ISSUE OF SUBSTANCE IN THIS CASE.

Petitioners contend that the doctrine of International Shoe Co. v. Washington, 326 U.S. 310 (1945), imposing Due Process limitations upon the exercise of personal jurisdiction by the state courts should be applied to federal courts. So applied, the petitioners contend that the decision below represents a violation of "traditional notions of fair play and substantial justice." Petition for Certiorari, p. 13.

At the outset it seems extremely doubtful that the power of Congress to establish the territorial limits of the inferior federal courts is limited by the Constitution. The Court of Appeals in this case (Pet. App. 12a) emphasized that Congress clearly had the power to establish a single nationwide District, and is certainly not limited by state or any other boundaries

in defining the jurisdiction of inferior federal courts. See also Driver v. Helms, Opp. App. 18a.

Moreover, if "traditional notions of fair play and substantial justice" would limit the jurisdiction of inferior federal courts, the petitioners can hardly show a denial of Due Process in this case for the following separate and distinct reasons:

A. The petitioners are not ordinary litigants. They employed the powers of their office to subpoena respondents from a variety of states to appear before a grand jury in Tallahassee, Florida, in many cases far from the respondents' homes and with only two to three days notice. Petitioners used the "color of legal authority" to harm respondents in the manner complained of. Congress was concerned in passing §1391(e) with giving citizens injured by such misused power a meaningful remedy.

As the First Circuit said in Driver v. Helms, Opp. App. 19a:

> We note that officers of the federal government are different from private defendants because they can anticipate that their official acts may affect people in every part of the United States.

B. This suit against federal officials is being brought in the seat of government and within the District where one of the defendants has his office and where petitioners' department headquarters are located. This is hardly a case where respondents arbitrarily chose a far-away District which had no real meaning in terms of the case itself.

C. The actual burden upon the petitioners in this case is quite ephemeral. Whatever may be the situation in other cases, here the government has furnished or paid for petitioners' counsel, who function out of either Washington, D.C. or New York.

There is in fact no burden or inconvenience to petitioners in litigating this matter in the District of Columbia.[10/]

10/ Petitioners' contention that some federal employee may not be defended by the Department of Justice is too hypothetical to require the attention of this Court. Even though the Solicitor General determined not to file a petition for a writ of certiorari in this case, the government undertook to pay for private counsel to enable the petitioners to ask this Court to review the decision below. Moreover, the position of the Department of Justice was clearly stated in the government's amicus curiae brief in the First Circuit in Driver v. Helms, supra (Gov't First Circuit Brief, p. 2-3). The government said:

> The interest of the United States in this matter is readily apparent. The Department of Justice regularly provides legal representation by private counsel for federal officials, past and present, who are personally sued for damages based on actions taken by those officials in the performance of their official duties. The United States is thus vitally concerned with any and all questions which have a significant impact on the conduct of such litigation.

D. Petitioners, who express much concern about fairness to themselves, seem to have little concern about fairness to the respondents. What petitioners are really asserting for is that, if respondents want one suit, respondents must sue a former United States Attorney (now a judge) and other government officials in the very jurisdiction where such officials have most impact upon jurors and judges. Alternatively, they might allow that respondents could have two separate suits -- one in Florida against petitioners and one in the District of Columbia against defendant Goodwin -- even though the defendants are charged with acting in concert. These are rather perverted notions of "fairness." The Congress' main concern when it enacted this legislation was to consciously ease the litigation burden upon plaintiffs suing federal officials. By their arguments,

petitioners have sought to turn the matter around so that the citizen may have to run all over the country -- bear the expense of a far way forum or unnecessarily multiple lawsuits -- and be relegated to an unfavorable forum -- to serve the convenience of federal officials.

E. Finally, as pointed out by the First Circuit in Driver v. Helms, Opp. App. 19a:

> We acknowledge that these appellants may have to answer complaints in a broader range of judicial districts than would non-governmental defendants. But they are not without protection. A district court has broad discretionary power" [f]or the convenience of parties and witnesses, in the interest of justice, [to] . . . transfer any civil action to any other district . . . where it might have been brought." 28 U.S.C.§1404(a). We would expect courts to be sympathetic to motions for change of venue when defendants would otherwise be substantially prejudiced and when there is an alternative venue that would protect the parties' rights.

Thus, the power of the district court to effect a change of venue in an appropriate case is the obvious safety valve to complaints of unfairness.[11/]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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11/ A change of venue motion was denied in this case by the district court. (Pet. App. 20a-24a)

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*/ Counsel wish to express their appreciation to Donna Demac, a law student at Boston College Law School, for her invaluable assistant in the preparation of this brief.

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 77-1482

RODNEY D. DRIVER, et al.,
APPELLEES,
v.
RICHARD HELMS, et al.,
APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*
CAMPBELL AND BOWNES, *Circuit Judges.*

Walter H. Fleischer, Donald J. Cohn and *Jacquelin A. Swords,* with whom *Earl Nemser, Cadwalader, Wickersham & Taft, George M. Vetter, Jr., Hinckley, Allen, Salisbury & Parson, Seymour Glanzer, Kenneth Adams, Joel Kleinman, Dickstein, Shapiro & Morin, James V. Kearney, Nancy E. Friedman, Webster & Sheffield, Alan T. Dworkin, Aisenberg & Dworkin, Joseph V. Cavanagh, Higgins, Cavanagh & Cooney, Charles R. Donnenfeld, Cameron M. Blake, Rodney F. Page, Arent, Fox, Kintener, Plotkin & Kahn, Guy J. Wells, Gunning, LaFazia & Gnys, Inc., Alfred F. Belcuore, Cole and Groner, P.C., Harry W. Asquith, Edward W. Moses, Swan, Kenney, Jenckes & Asquith, Wallace L. Duncan, Duncan, Brown, Weinberg & Palmer, Joseph Dailey* and *Breed, Abbott & Morgan* were on briefs, for appellants.

Melvin L. Wulf, with whom *Clark, Wulf & Levine, Burt Neuborne, Richard W. Zacks, Winograd, Shine & Zacks,* and *Joel M. Gora* were on brief, for appellees.

Barbara Allen Babcock, Assistant Attorney General, *Lincoln C. Almond,* United States Attorney, *Robert E. Kopp* and *Paul Blankenstein,* Attorneys, Appellate Section, Civil Division, Department of Justice, on brief for United States, amicus curiae.

APPENDIX A

May 25, 1978

COFFIN, *Chief Judge.* Plaintiffs-appellees brought this action in 1975 in the federal district court for the district of Rhode Island on behalf of themselves and others similarly situated. Their complaint alleges that the defendants-appellants[1] illegally interfered with their mail, thereby violating appellees' rights under the First, Fourth, Fifth, and Ninth Amendments. The suit seeks damages and declaratory and injunctive relief. Subject matter jurisdiction was invoked under 28 U.S.C. §§ 1331 a), 1339, 1343, 1361, and 5 U.S.C. § 702.

Appellants are 25 present or former United States government officials, each sued in his individual and in his official or former official capacity. One of the named plaintiffs, Driver, lives in Rhode Island,[2] but none of the appellants reside in or have substantial contacts with Rhode Island, and the complaint does not allege that any illegal activity occurred in Rhode Island.[3] Therefore, venue is not proper under 28 U.S.C. § 1391(b), and, since none of the appellants were served within Rhode Island,[4] service of process was inappropriate under F. R. Civ. P. 4(f).

Appellees invoke 28 U.S.C. § 1391(e) to support venue and service of process:[5]

> "A civil action in which each defendant is an officer or employee of the United States or any agency

[1] Other defendants in the case below are not parties to this appeal.

[2] The other named plaintiffs are residents of New York, Minnesota, Connecticut, and California.

[3] The illegal interference with appellees' first-class mail is alleged to have occurred in New York City.

[4] The appellants each were served by certified mail outside Rhode Island.

[5] Appellees also suggested that Rhode Island's long arm statute supplied jurisdiction. R.I. Gen. Laws § 9-5-33 (1956). *See Driver* v. *Helms,* 74 F.R.D. 382, 400 n. 23 (D. R.I. 1977). This issue is not presented by this appeal.

> thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> "The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."[6]

Appellants filed motions to dismiss under Federal Rules of Civil Procedure 12(b)(2) (lack of jurisdiction over the person), 12(b)(3) (improper venue), and 12(b)(4) (insufficiency of process). The district court denied these motions, but certified that the questions involved controlling issues of law as to which there is substantial ground for difference of opinion and that an immediate appeal could materially advance the litigation. *Driver* v. *Helms,* 74 F.R.D. 382, 401-02 (D. R.I. 1977). We thus have appellate jurisdiction under 28 U.S.C. § 1292(b).

Appellants argue that 28 U.S.C. § 1391(e), contrary to the holding of the district court, does not give venue to the district court in Rhode Island, does not give the court

[6] 28 U.S.C. § 1391(e) was amended in 1976. The word "each" was changed to "a" in the first sentence, and the following sentence was added to the end of the first paragraph:

> "Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party."

P.L. 94-574, § 3, 90 Stat. 2721 (Oct. 21, 1976).

jurisdiction over the persons of the appellants, and does not authorize the service of process on these appellants. They argue that reliance on § 1391(e) is misplaced because that section does not apply to former officials, does not apply to suits against officials for damages in their individual capacities, and does not independently supply in personam jurisdiction.

THE FORMER OFFICIALS

Ordinarily the plain meaning of the language of a statute is controlling. *See Massachusetts Financial Services, Inc.* v. *Securities Protector Investor Corp.*, 545 F.2d 754, 756 (1st Cir. 1976). Section 1391(e) applies, by its terms, when a "defendant *is* an officer or employee of the United States . . . *acting* in his official capacity or under color of legal authority . . . ." (emphasis added) Because the operative language is in the present tense, we read the section to exclude a defendant who *was* an officer or employee.

"Of course, deference to the plain meaning rule should not be unthinking or blind. We would go beyond the plain meaning of statutory language when adherence to it would produce an absurd result or 'an unreasonable one "plainly at variance with the policy of the legislation as a whole."' " *Massachusetts Financial Services, supra,* 545 F.2d at 756, *quoting United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940), *quoting Ozawa* v. *United States*, 260 U.S. 178, 194 (1922); *cf. Natural Resources Defense Counsel* v. *TVA*, 459 F.2d 255, 257 (2d Cir. 1972) (eschewing the "tyranny of literalness").[7] We do not, however, find any indication in the statute itself or in the legislative

[7] "[W]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *Culbert*, 46 U.S.L.W. 4259, 4260 n. 4 (U.S. March 28, 1978), *quoting United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543-44 (1940).

history that former officials were meant to be included. We are not alone in this conclusion. *See Kipperman* v. *McCone*, 422 F. Supp. 860, 876 (N.D. Cal. 1976); *Wu* v. *Keeney*, 384 F. Supp. 1161, 1168 (D. D.C. 1974).

The cases that have reached a contrary result have decided that excluding former officials would undercut the policies of § 1391(e). *See Driver* v. *Helms, supra,* 74 F.R.D. at 398-400; *United States* v. *McAninch*, 435 F. Supp. 240, 245 (E.D. N.Y. 1977); *Lowenstein* v. *Rooney*, 401 F. Supp. 952, 962 (E.D. N.Y. 1975). We do not think it absurd or plainly at variance with the policies of § 1391(e) to limit it to those who are government officials at the time the action is brought.[8] We are unimpressed by the specter of government officials resigning their positions simply because they fear an action might be brought against them. As the court below noted, resignation would not terminate their liability. *See Driver* v. *Helms, supra,* 74 F.R.D. at 399-400. The most an official could gain would be to avoid venue in the district where a plainitiff lives. A career in government service is, one would think, a disproportionate sacrifice to make for so small a gain. Moreover, we are not persuaded that Congress' desire "to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government", H. Rep. No. 536, 87th Cong., 1st Sess. 3 (1961) [hereinafter referred to as House Report], indicates that Congress meant § 1391(e) to provide a net that could draw everyone connected with a governmental action into litigation in a particular district. For instance, those who were never government officials but are defendants in a law suit clearly cannot be

[8] We do not focus on a later time, such as the time when a hearing is held or a decision issued, because the statute speaks to the ability to bring an action. Moreover, if a court were not able to determine venue at the time an action is brought, judicial processes could be thrown into chaos by mobile litigants.

reached by § 1391(e).[9] In fact there is a clear indication in the legislative history that Congress did not mean to reach at least those former officials who have moved away from Washington.[10] Therefore, we reverse the district court as to this point and hold that § 1391(e) does not apply to those defendants who, at the time this action was brought, were not serving the government in the capacity in which they performed the acts on which their alleged liability is based.[11]

Personal Damage Actions

The next issue we must face is whether § 1391(e) applies to actions for damages against officials in their individual capacities. Section 1391(e) was passed, together with 28 U.S.C. § 1361, as the Mandamus and Venue Act of 1962. Before 1962 most actions against federal officials could not be brought outside the District of Columbia. Higher officials residing in Washington were usually indispensable parties against whom venue could not be secured except in Washington. Furthermore, such actions

[9] That such defendants may exist is indicated by the 1976 amendment. *See* note 6, *supra*.

[10] "This bill is not intended to give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia." H. Rep. No. 536, 87th Cong., 1st Sess. 2 (1961). Prior to 1962 (when the bill was passed) former officials who had moved away from Washington would not have been subject to suit in Washington.

[11] The act is directed at officials "*acting* . . . under color of legal authority". Since official acts expose the officer to expanded venue, and since we have concluded that this exposure terminates when the official leaves office, it would be anomalous to hold that one of the appellants serving the government in a different capacity is nonetheless still exposed to national venue and service of process. As to the act or omission that exposed him to liability, it is only fortuitous that he is still in government. We need not now decide whether someone who has been promoted in the same department is likewise exempted from the operation of § 1391(e).

were often in the nature of mandamus, and federal district courts outside the District of Columbia lacked subject matter jurisdiction over mandamus actions. The crux of appellants' argument is that § 1391(e) should be narrowly construed as a companion to § 1361, designed to combat the specific, relatively narrow problem that spurred Congress to act. That is, they would have us read § 1391(e) to do no more than supply venue in those suits made possible by § 1361, "suits in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The Second Circuit has twice followed similar reasoning, but in cases distinguishable from ours. In *Liberation News Service* v. *Eastland*, 426 F.2d 1379 (2d Cir. 1970), the court said that § 1391(e) was aimed at the mischief posed by the inability to review government action outside Washington and that § 1391(e) reached only those who might be subject to compulsion under § 1361. The holding of the case, however, was that the section did not apply to legislators.[12] The court did not have occasion to decide the kinds of civil actions that could be brought against someone to whom § 1391(e) did apply. In *Natural Resources Defense Council* v. *TVA*, *supra*, 459 F.2d at 255, the court said that §§ 1391(e) and 1361 must be read together, *id.* at 258, and that the literal meaning should not necessarily control, *id.* at 257; but the holding was that § 1391(e)'s venue provisions did not apply to the TVA because another statute controlled venue for actions against the TVA. *Id.* at 259. Section 1391(e) states that it applies "except as otherwise provided by law." The court went on to point out that a suit against the TVA could not have been brought in Washington before 1962. *See* House Report, *supra*, at

[12] We do not indicate our views on this holding. *See* note 17, *infra*.

2.[13] In this case the action, at least as against current officials, could have been brought in Washington.

The weakness of the argument, even apart from the fact that it reflects no clear signal from the legislative history discussed below, is that we must interpret the United States Code as it is written. Congress did not limit the application of § 1391(e) to "actions in the nature of mandamus". Rather Congress used the words "[a] civil action in which each defendant is an officer or employee of the United States . . . acting . . . under color of legal authority." The statute does not, by its terms, limit the kind of civil action to which it applies. The case at bar is a civil action. The complaint alleges that the defendant officers of the United States were acting "under color of legal authority". All elements fit — and we deal with a statute speaking in a highly technical field, venue and jurisdiction, where, if anywhere, precision is required.

The plain language of § 1391(e) covers this case, but again we would go beyond the plain language if the result were absurd or plainly at variance with congressional policies. We conclude, after considering such questions, as have many other courts, that § 1391(e) should cover damage actions against officers in their individual capacities.[14] *See Briggs* v. *Goodwin*, 569 F.2d 1 (D.C. Cir. 1977); *Ellingburg* v. *Connett*, 457 F.2d 240, 241 (5th Cir. 1972);

[13] *See* note 10, *supra*.

[14] The Supreme Court has said that § 1391(e) does not apply to habeas corpus actions, *Schlanger* v. *Seamans*, 401 U.S. 487, 490 n. 4 (1971), but that decision turned on the special nature of habeas corpus actions which though "technically 'civil,' . . . [are] not automatically subject to all the rules governing ordinary civil actions." *See also* the cases cited by the court below. 74 F.R.D. at 391-92.

We might have viewed *Relf* v. *Gasch*, 511 F.2d 804 (D.C. Cir. 1975), as contrary authority, but in *Briggs* v. *Goodwin*, *supra*, 569 F.2d at 6-7, the same circuit confined *Relf's* holding to situations where the alleged wrong was not connected with the defendant's government service.

Driver v. *Helms*, *supra*; *United States* v. *McAninch*, *supra*; *Lowenstein* v. *Rooney*, *supra*; *Patmore* v. *Carlson*, 392 F. Supp. 737, 738 (E.D. Ill. 1975); *Wu* v. *Keeney*, 384 F. Supp. 1161 (D. D.C. 1974); *Green* v. *Laird*, 357 F. Supp. 227 (N.D. Ill. 1973); Hart & Wechsler, The Federal Courts and the Federal System 1388 (1973); 2 Moore, Federal Practice ¶ 4.29, 1210 (1977). *Cf. Kletschka* v. *Driver*, 411 F.2d 436, 442 (2d Cir. 1969) (basing venue on § 1391(b) but adding that § 1391(e) "seems" to apply as well). *But see Kenyatta* v. *Kelly*, 430 F. Supp. 1328, 1330 (E.D. Pa. 1977); *Davis* v. *F.D.I.C.*, 369 F. Supp. 277 (D. Colo. 1974); *Paley* v. *Wolk*, 262 F. Supp. 640 (N.D. Ill. 1965).

The legislative history of § 1391(e) is at best ambiguous, but there are indications that the drafters of the legislation understood that the act might apply to actions such as this one and were not sufficiently bothered by that possibility to prevent it. This act originated as H.R. 10089, 86th Cong., 2d Sess. (1960).[15] That bill was limited to officers acting in their official capacity, and its author, Representative Budge, explained that it was intended to meet the narrow problem described above. Hearing Before the Committee on the Judiciary (Subcommittee No. 4), 86th Cong., 2d Sess. 2-4 (May 26 and June 2, 1960) [hereinafter cited as Hearings].[16] The hearings on the bill before a subcommittee of the Committee on the Judiciary demonstrate that at least some members of that subcommittee did not want the bill limited to a narrow purpose. For instance, at one point Mr. Drabkin, the subcommittee's counsel, stated, "I think what

[15] H.R. 10089 read, in pertinent part:

> "A civil action in which each defendant is an officer of the United States in his official capacity, a person acting under him, or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides."

[16] The unpublished transcripts of these hearings were submitted to us by appellants, and appellees have not disputed their authenticity. We have verified the authenticity, accuracy, and availability of these transcripts through the office of the General Counsel to the House of Representatives' Committee on the Judiciary.

this bill is concerned with doing is dealing with mandamus and also dealing with petitions for review which may not properly be brought now because of some venue defect." Congressman Dowdy responded, however, "I asked to be sure it was not limited to that." *Id.* at 32.

Later in the same hearing Mr. MacGuineas, a representative from the Department of Justice, said he did not understand what the bill was trying to do. "In order to understand that we would have to know how this bill is intended to affect each particular type of suit that a citizen may want to bring against a Government official, and there are many different types." Congressman Dowdy responded, "Maybe we want it to apply to all suits. There is not any particular one. We want it to apply to any one." Congressman Whitener followed that up by saying, "I did not understand there was any doubt." *Id.* at 53-54. One type of suit hypothesized by Mr. MacGuineas was a slander suit against a congressman.[17] Congressman Whitener indicated that he felt the bill should cover such a situation, Hearings, *supra* at 55, and he compared it to a postal worker slapping a housewife as he delivered mail. *Id.* at 58.

The desire to reach a variety of causes of action prompted the first mention of the "under color of legal authority" phrase. After a discussion whether certain kinds of acts would constitute official action or not, Mr. Drabkin proposed, "Suppose in order to take care of a body of law which seems to say that when a government official does something wrong he is acting in his individual capacity, we added the following language—'acting in his official

[17] The Second Circuit has held that § 1391(e) does not apply to legislators, but the holding was based in part on not finding any "word in the five year gestation period of § 1391(e) to suggest that Congress thought it was changing the law not merely with respect to the executive branch but also concerning itself, its officers and its employees." *Liberation News Service* v. *Eastland*, 426 F.2d 1379, 1384 (2d Cir. 1970). This issue is not presented to us, and we do not decide it.

capacity or under color of legal authority.' That would not bring in the type of situation in which a postman, after he had gone home for the night, proceeded to run over somebody's child." *Id.* at 61-62. This is the first appearance of the "under color" language, and its context suggests that it was understood to exclude only those personal damage actions arising from purely private wrongs.

The Department of Justice expressed reservations about the utility of H.R. 10089 because it was limited to "official actions", and did not expand subject matter jurisdiction. Most actions against government officials, such as those seeking personal damages for acts in excess of official authority, would not be covered by a bill limited to "official capacity". Actions that would be "official", would be equivalent to mandamus actions, and so would still be confined to the District of Columbia for lack of subject matter jurisdiction elsewhere. *See Briggs* v. *Goodwin, supra,* 569 F.2d at 4. The new bill, H.R. 12622, 86th Cong., 2d Sess. (1960), met these objections. Section 1 of the bill added a new section, now codified as 28 U.S.C. § 1361, extending mandamus jurisdiction to all district courts.[18] In section 2 of the bill, § 1391(e), Congress included, inter alia, the phrase "under color of legal authority". *See Briggs* v. *Goodwin, supra,* 569 F.2d at 4-5.

This bill was reintroduced in the next Congress as H.R. 1960, 87th Cong., 1st Sess. (1961). The Department of Justice, in a letter from then Assistant Attorney General Byron White suggested more changes. The letter recognized that section 2 of the bill, the new § 1391(e) "covers an entirely different subject" than section 1, the new 28 U.S.C. § 1361, and that unless clarified § 1391(e) might

[18] 28 U.S.C. § 1361 reads:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

apply to "suits for money judgments against officers." S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), 1962 U.S. Code Cong. & Adm. News 2784, 2789 [hereinafter cited as Senate Report].[19] Though acting on other suggestions from that letter,[20] Congress did nothing to eliminate personal damage actions. In fact, both the House and Senate reports state, "The venue problem also arises in an action against a Government official seeking damages *from him* for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." House Report, *supra,* at 3; Senate Report, *supra,* 1962 U.S. Cong. & Admin. News at 2786 (emphasis added).[21]

In the face of all of this, appellants argue that § 1391(e) was meant to do no more than provide venue in cases to which § 1361 applies, actions in the nature of mandamus brought outside the District of Columbia. In support of this argument they point to language in the legislative history that "[t]he purpose of this bill is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on

[19] At minimum this letter demonstrates that Congress was on notice that personal damage actions against government officials were possible, contrary to appellants' argument that due to broad immunity under the doctrine of *Barr* v. *Mateo,* 360 U.S. 564 (1959), and because *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), was not yet decided, Congress would not have been thinking of such actions.

[20] For example, the letter suggested that the mandamus jurisdiction section should be limited to actions to compel a duty "owed the plaintiff". The Senate, by amendment adopted this provision, and the House accepted the amendment. *See* note 17, *supra. See generally Briggs* v. *Goodwin,* 569 F.2d 1, 5 n. 39 (D.C. Cir. 1977).

[21] This passage undermines appellants' argument that the only damage actions Congress contemplated were actions in the nature of mandamus against an official to recover money allegedly owed to the plaintiff by the United States.

jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." House Report, *supra,* at 1. Appellants also point to the following paragraph of the Report:

> "By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is *nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority* and not as a private citizen. *Such actions are also in essence against the United States* but are brought against the officer or employee as individual only to circumvent what remains of the doctrine of sovereign immunity. The considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions where the action is *based upon the fiction that the officer is acting as an individual.* There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned." *Id.* at 3-4 (emphasis as supplied by appellants).

We do not think that these passages clearly exclude the result that we have reached. Even if we were to acknowledge that the primary purpose of § 1391(e) was to expand venue in mandamus cases, that would not preclude it from serving other purposes as well. That it does do so and was intended to do so is indicated by the legislative history described above.

Further, unless one were prepared to argue that the 1976 amendment was a mistake, we think it must be taken as a further indication that Congress, whatever its intent at the time it passed § 1391(e), now understands the section to reach personal damage actions. The amendment, note 6, *supra*, allows defendants who are not government officers to be joined in an action with officers when venue as to the officers is asserted under § 1391(e). It would make little sense to join someone who is not an officer if the suit were limited to an action in the nature of mandamus. Therefore, the suit Congress was contemplating must be aimed at acts that can give rise to liability for private remedies.

We affirm the district court's holding that § 1391(e) applies to personal damage actions.

PERSONAL JURISDICTION

Appellants' final argument is that § 1391(e)'s service of process provision facilitates the broadened venue provisions, but only if the district in which the suit is brought can establish personal jurisdiction by some other mechanism. In the alternative they argue that even if § 1391(e) broadens personal jurisdiction, it would be unconstitutional to apply it to individuals who lacked the minimum contacts with the state in which the court sits that are required by *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny.

Appellants state their argument as follows:

> "Nothing in Section 1391 speaks to personal jurisdiction. The statute is entitled 'venue generally' and sets forth in its various sections the rules of venue in civil actions. The statute specifically authorizes only a method of service of process, as distinct from a grant of *in personam* jurisdiction, for the federal officers or agencies within its purview. Indeed, the service of process provision in the statute emphasizes the focus

> of the statute on review of agency actions and present officials since service is to be made 'to the officer or agency.' The statute addresses only the mechanics of service of process and does not address the exercise of personal jurisdiction. Obviously, it is one thing for an individual to be served the process extraterritorily [*sic*], but quite another for that individual to be subject to the personal jurisdiction of a court in compliance with the Constitutional requirements of due process."[22]

It is true that jurisdiction over the person and service of process are distinguishable, but they are closely related.[23] "[S]ervice of process is the vehicle by which the court may obtain jurisdiction." *Aro Manufacturing Co.* v. *Automobile Body Research Corp.*, 352 F.2d 400, 402 (1st Cir. 1965). If Congress, by § 1391(e), authorized service of process beyond the geographical limits that F. R. Civ. P. 4(f) would otherwise impose, and if such service does not violate the Constitution, then service was properly made in this case, and the court properly acquired jurisdiction over the persons of the appellants.

Because appellants are being sued in their individual capacities, they must be served as required by F. R. Civ. P.

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[22] The facts that § 1391(e) was part of "The Mandamus and Venue Act" and that it is codified in a chapter labelled "District Courts; Venue" are factors to consider in determining whether the statute can be used as a basis of personal jurisdiction. They do not overcome, however, the plain language of the statute, which read in the light of the legislative history, *see United States* v. *Culbert*, *supra*, note 7, as set out in the text, indicates that the statute confers personal jurisdiction as well as venue. Moreover, there is not an obviously more appropriate chapter of the code. The chapter entitled "District Courts; Jurisdiction" deals exclusively with subject matter jurisdiction.

[23] The distinction is most important, as an issue of federal practice, in diversity cases. A state long arm statute might authorize extraterritorial service of process that would reach a defendant over whom the state could not constitutionally exercise personal jurisdiction.

4(d)(1), rather than 4(d)(4) or 4(d)(5). That is, a copy of the summons and complaint must be personally delivered. Rule 4(f), however, limits service of process to the territory of the state in which the court is sitting. But Rule 4(f) permits statutory exceptions, and Congress has, in some cases, authorized service of process beyond state boundaries. *See Robertson* v. *Railroad Labor Board,* 268 U.S. 619, 622 (1925); 4 Wright & Miller, Federal Practice and Procedure, § 1125 (1969); Hart & Wechsler, *supra,* at 1106-07. The first question is whether Congress did so in this case.

The second paragraph of § 1391(e) provides that "[t]he summons and complaint . . . shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought." Clearly this provision does more than describe the mechanics of service of process. It creates an exception to the general rule by allowing service of process anywhere in the United States by certified mail.

Not only does our reading of the statute command such an interpretation, but we are persuaded that this is precisely what Congress intended. Judge Maris, testifying before the subcommittee as a representative of the Judicial Conference, pointed out that the original bill, H.R. 10089, created a "problem about the acquisition of jurisdiction in personam by the Court in the venue" created by the bill. Hearings, *supra,* at 87. The bill relied on the Federal Rules of Civil Procedure to provide service of process, but Rule 4 would not permit service of process on the individual involved in the suit if that individual were outside the state in which the suit was brought. Judge Maris suggested that the statute provide for broader service:

> "There are statutes which do, like the Antitrust Laws, the Sherman Antitrust Act, under which you can bring a suit against defendants and serve them anywhere in the United States, and of course under the Bankruptcy Act you can serve persons anywhere in the United States.
>
> "Now what you would have to do here it seems to me would be to provide for the service that we discussed, namely, service upon the U.S. Attorney, service by mail upon the Attorney General, and also service by mail anywhere in the United States upon the officer or agent being sued.
>
> "That would take care of it because all that is necessary is for Congress to authorize service to be made outside of the District, and it is perfectly valid to do so." Hearings at 88-89.

Congress, following Judge Maris' suggestion, provided nationwide service of process by mail and expected that broadening service would correspondingly broaden personal jurisdiction. Congress recognized that it would serve no purpose to broaden venue without also broadening service of process. House Report, *supra,* at 4. *See Briggs* v. *Goodwin, supra,* 569 F.2d at 7-8. Thus, to the same extent that § 1391(e) supplies venue, it supplies the mechanism to secure personal jurisdiction.[24]

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[24] *See Briggs* v. *Goodwin, supra,* 569 F.2d at 8; *Liberation News Service* v. *Eastland,* 426 F.2d 1379, 1382 (2d Cir. 1970) (dictum); *United States* v. *McAninch,* 435 F. Supp. 240, 244 (E.D. N.Y. 1977); *Driver* v. *Helms,* 74 F.R.D. 382, 389 (D. R.I. 1977); *Lowenstein* v. *Rooney,* 401 F. Supp. 952 (E.D. N.Y. 1975); *Crowley* v. *United States,* 388 F. Supp. 981, 987 (E.D. Wis. 1975); *Environmental Defense Fund, Inc.* v. *Froehlke,* 348 F. Supp. 338, 364 (W.D. Mo. 1972), *aff'd,* 477 F.2d 1033 (8th Cir. 1973); *English* v. *Town of Huntington,* 335 F. Supp. 1369, 1373 (E.D. N.Y. 1970); *Macias* v. *Finch,* 324 F. Supp. 1252, 1255 (N.D. Cal. 1970); *Brotherhood of Locomotive Engineers* v. *Denver & Rio Grande Western R.R. Co.,* 290 F. Supp. 612 (D. Colo. 1968), *aff'd,* 411 F.2d 1115 (10th Cir. 1969). *Cf. Ashe* v. *McNamara,* 355 F.2d 277, 279 (1st Cir. 1965).

Having concluded that Congress did create nationwide service of process, we must next decide whether § 1391(e), so interpreted, is constitutional. Appellants argue, and we will assume, that they lack "minimum contacts" with the State of Rhode Island. The minimum contacts test was developed in cases testing the limits of a state's jurisdiction over those not found within its boundaries. The circumscription of state court jurisdiction is a product of boundaries to states' sovereignty.[26] The United States, however, whose court is here asserting jurisdiction, does not lose its sovereignty when a state's border is crossed. The Constitution does not require the federal districts to follow state boundaries. That decision was made by Congress, and Congress could change its mind. Whether or not Congress could go so far as to establish only one national district court, *see Briggs* v. *Goodwin, supra,* 569 F.2d at 9, it is clear that Congress could greatly reduce the number of federal districts and draw their boundaries without regard to state boundaries. *See id.*, at 8-10.

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[26] This remains true even after *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), and *Shaffer* v. *Heitner,* 433 U.S. 186 (1977). A state boundary is still a significant jurisdictional demarcation because if a defendant is found and served within the state, minimum contacts need not be established, and jurisdiction may be asserted on the basis of the state's sovereignty. We see no reason why the United States does not have the same power over defendants found within its borders. Even if we were to say that minimum contacts had to be established, anyone found and served within the United States would have sufficient contacts with the United States. *See United States* v. *McAninch,* 435 F. Supp. 240, 244 (E.D. N.Y. 1977).

Appellants argue that the two Supreme Court cases cited above demonstrate that the Court has banished sovereignty as a factor in determining jurisdiction, substituting a test based on "[f]air play and substantial justice [which] are in the main functions of distance." We can think of no case that has made distance a factor in determining minimum contacts. The test to determine whether a defendant may be brought before a state's courts, say the courts of Rhode Island, is no different whether that defendant is found in Connecticut or in Hawaii.

Appellants next argue, with some force, that it would be very unfair and would violate due process to force them, as individuals, to answer suits in districts with which they have no connection and, further, that answering such suits places a burden upon them greater than that carried by a private litigant who would not have to travel to a far-away court—a court which might be far removed from the place where the cause of action arose, and which might have been chosen because the plaintiffs felt the judge would be friendly to their claims. We acknowledge that these appellants may have to answer complaints in a broader range of judicial districts than would non-governmental defendants. But they are not without protection. A district court has broad discretionary power "[f]or the convenience of parties and witnesses, in the interest of justice, [to] . . . transfer any civil action to any other district . . . where it might have been brought." 28 U.S.C. § 1404(a). We would expect courts to be sympathetic to motions for change of venue when defendants would otherwise be substantially prejudiced and when there is an alternative venue that would protect the parties' rights. Furthermore, we note that officers of the federal government are different from private defendants because they can anticipate that their official acts may affect people in every part of the United States.

Congress is, of course, limited in the actions it can take by the Due Process Clause of the Fifth Amendment, but application of the Clause is not related to state boundaries. Rather, the requirement is that the nationwide "service required by statute must be reasonably calculated to inform the defendant of the pendency of the proceedings in order that he may take advantage of the opportunity to be heard in his defense." *Mariash* v. *Morrill,* 496 F.2d 1138, 1143 (2d Cir. 1974). Certainly the certified mail requirement in § 1391(e) meets that standard. Such service is not extra-

territorial for a court of the United States; therefore, the minimum contacts analysis is not relevant. We conclude that national service of process as provided by § 1391(e) is constitutional.[26] *Briggs* v. *Goodwin, supra*, 569 F.2d at 8-10; *United States* v. *McAninch, supra*, 435 F. Supp. at 244; *Driver* v. *Helms, supra*, 74 F.R.D. at 391.

Affirmed in part, reversed in part, and remanded.

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[26] The Supreme Court has apparently not decided this precise issue since *International Shoe*. In one case the Court decided not to address the issue. *United States* v. *Scophony Corp.*, 333 U.S. 795, 840 n. 13 (1948).

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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1546

WILLIAM H. STAFFORD, JR.,
STUART J. CARROUTH and
CLAUDE MEADOW,

Petitioners,

v.

JOHN BRIGGS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-19a) is reported at 569 F.2d 1. The opinion of the district court (Pet. App. C, pp. 25a-26a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. D, p. 28a) was entered on September 21, 1977. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on December 1, 1977 (Pet. Apps. E and F, pp. 29a-30a). On February 23, 1978 petitioners' time to file a petition for a writ of certiorari was extended until April 30, 1978 (Pet. App. G, p. 31a). The petition for a writ of

certiorari was filed on April 30, 1978, and granted on January 15, 1979. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Section 2 of the Mandamus and Venue Act of 1962, 28 U.S.C. §1391(e), grants the district court nationwide *in personam* jurisdiction over federal officials sued for damages in their personal capacities, and not "nominally" in suits "in essence against the United States", for acts performed under color of law.

2. Whether such a grant of *in personam* jurisdiction violates the due process clause of the fifth amendment.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The Mandamus and Venue Act of 1962, as amended, is codified in Title 28, and provides:

"§1361. Action to compel an officer of the United States to perform his duty

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

"§1391. Venue generally

* * * *

"(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or

(4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

The fifth amendment provides, in part:

"No person shall ... be deprived of life, liberty, or property, without due process of law... ."

STATEMENT [1]

This is a civil rights action brought in the District of Columbia seeking money damages for allegedly unconstitutional acts against four individuals who were federal officials at the time the action was commenced.

Defendants below are petitioner William H. Stafford, Jr., former United States Attorney for the Northern District of Florida (now United States District Judge for the Northern District of Florida); petitioner Stuart J. Carrouth, former Assistant United States Attorney for the Northern District of Florida (now in private law practice in Florida); petitioner Claude Meadow, a Special Agent of the Federal Bureau of Investigation stationed in Florida; and Guy L. Goodwin, a senior trial attorney with the United States Department of Justice in Washington, D. C.

Plaintiffs are ten individuals called to testify before a Grand Jury in Tallahassee, Florida in the summer of 1972.

1. This case is docketed for argument in tandem with *Colby* v. *Driver*, No. 78-303, which raises the same issues.

According to the complaint, six of the plaintiffs reside in Florida; two in Texas; and one each in Delaware and New York. Eight of the plaintiffs were indicted by the Grand Jury for conspiracy and interstate travel with intent to cause a riot. *United States* v. *Briggs, et al.*, GCR 1353 (N.D. Fla.). The trial ended on August 31, 1973 in judgments of acquittal for all defendants. [2] Goodwin, who is not a petitioner here, was the attorney in charge of those Grand Jury proceedings. The complaint alleges that he perjured himself when he was examined under oath before the district judge presiding as to the presence of government informants among the subpoenaed witnesses represented by counsel. The complaint alleges that petitioners knew of Goodwin's perjury and remained silent, as part of a conspiracy to deprive plaintiffs of their rights under the first, fourth, fifth, sixth, eighth and ninth amendments, as well as 18 U.S.C. §§241, 242, 371, 401, 402, 1621, 1622; 28 U.S.C. §§2201-2202; and 42 U.S.C. §§1983, 1985, 1986, 1988.

Each plaintiff seeks compensatory damages of $50,000 and punitive damages of $100,000. The complaint also demands declaratory and injunctive relief, together with an order appointing a "special prosecutor" to bring criminal proceedings against Goodwin and petitioners. Jurisdiction in the district court is predicated on 28 U.S.C. §§1331, 1332, 1343, 1651, 2201, 2202.

Before answering, petitioners moved in the district court of the District of Columbia to dismiss for lack of personal jurisdiction and improper venue; in the alternative, petitioners moved for a change of venue from the District of Columbia to the Northern District of Florida, where all the alleged wrongs took place. The district judge denied the request for a change of venue, but granted the motion to dismiss. The court also certified the order of dismissal for

2. The two other plaintiffs were held in contempt for refusing to answer the Grand Jury's questions.

interlocutory review pursuant to Federal Rule of Civil Procedure 54(b).

The court of appeals reversed, holding that 28 U.S.C. §1391(e) subjects all federal officials sued for damages in their personal capacities to *in personam* jurisdiction in every district court, notwithstanding the absence of any affiliating circumstances with the forum chosen by plaintiffs. The court rejected petitioner's arguments that the statute was not applicable to suits against them personally for money damages, was not jurisdictional, and would be unconstitutional as interpreted.

SUMMARY OF ARGUMENT

The general rule of *in personam* jurisdiction applied in both state and federal courts is that one is subject to jurisdiction where he is "present". Congress has traditionally been sensitive to this rule and has never sought to go beyond it in ordinary civil litigation among private parties. *Robertson* v. *Railroad Labor Board*, 268 U.S. 619 (1925). In the absence of a clear legislative mandate, the court below has mistakenly interpreted Section 1391(e) as a radical and unprecedented break with the past.

A mere reading of the legislative history and the succinct Congressional reports demonstrates that Congress, on the contrary, intended to avoid such result and confine the venue statute to facilitating review of administrative action. The sponsor of the bill stated he had "no intention of bringing tort actions against individual government employees."

The opinion below, if followed, will render several million federal employees subject to widely scattered personal suits for money damages in every federal district court solely because of their federal employment, without regard to the total unsuitability of the forum selected by plaintiff.

The vexatious nature of the holding below is readily apparent considering the ease today with which one can commence litigation against an official and charge unlawful conduct.

The holding below cannot be reconciled with the clear wording of the statute involved - the Mandamus and Venue Act of 1962, 28 U.S.C. §§1361 and 1391(e). The venue provision, Section 2 (§1391(e)) of the statute, addresses a civil action in which a defendant is a federal official "acting in his official capacity or under color of legal authority." By using the word "acting" and casting the statute in the present, active tense it is clear that Congress intended only to cover actions in the nature of mandamus. This is wholly consistent with Section 1 of the Mandamus and Venue Act of 1962, 28 U.S.C. §1361.

The decision below cannot be reconciled with the purpose of the Mandamus and Venue Act, as expressed in the House and Senate Committee reports, to make it possible to bring actions against officials which formerly could be brought only in the District of Columbia.

The legislative history repeatedly indicates that the Mandamus and Venue Act is not intended to give access to the federal courts to an action which in 1962 could not be brought only in the District of Columbia. Before the passage of the statute, this suit against petitioners could have been brought in any district in which they resided. Only actions nominally against federal officials were restricted to the District of Columbia.

The legislative history also makes clear that the Mandamus and Venue Act is only intended to apply to actions "in essence against the United States". By using the phrase "under color of legal authority" Congress intended to include only those actions which are brought nominally against an officer in his individual capacity to circumvent what remains of the doctrine of sovereign immunity.

Such actions are also in essence against the United States. This suit against petitioners is not in any sense brought in essence against the United States. This suit obviously seeks money damages from their own personal resources. The difference is critical.

The law in effect in 1962 when the act was passed leads inescapably to the conclusion that Congress could not have intended Section 1391(e) to cover this type of suit which did not arise in the federal courts because of the doctrine of absolute official immunity and the absence of a federal claim. *Cf. Butz* v. *Economou*, 98 S. Ct. 2894 (1978), and *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). If Congress intended to take the radical step of subjecting all federal employees to *in personam* jurisdiction in personal damage actions in the 94 United States District Courts throughout the country, Congress certainly would have made its intent clearly known. Furthermore, Congress would have had to consider the substantial constitutional problems involved.

The court below applied the wrong standard in interpreting the statute. In *Robertson* v. *Railroad Labor Board*, *supra*, this Court cautioned that we cannot lightly assume that Congress intends to depart from the traditional rule of *in personam* jurisdiction. Further, an interpretation of the statute which requires resolution of the substantial fifth amendment due process issue violates the principle set forth by Mr. Justice Brandeis in his concurring opinion in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936).

In the event that Section 1391(e) does somehow confer nationwide *in personam* jurisdiction over petitioners, its application in this case to petitioners would violate fifth amendment due process. Fifth amendment due process guarantees reasonable access to the courts and a reasonable opportunity to defend. Requiring petitioners to defend

themselves in personal damage actions in forums far from home, with which they have no affiliation, and where no unlawful act is alleged to have occurred, places an intolerable burden on their right to defend.

ARGUMENT

I
Section 1391(e) Does Not Apply To Damage Actions Brought Against Federal Officials In Their Private Individual Capacities.

The Mandamus and Venue Act of 1962 is not a sweeping grant of *in personam* jurisdiction as envisioned by the court below. The statute is a narrow, technical enactment meant only to enable courts outside the District of Columbia to hear non-statutory review actions brought in essence against the United States. The bill was "directed primarily at facilitating review by the federal courts of administrative actions." *See* House Report No. 1996 at 1, 86th Cong., 2d Sess. (1960); House Report No. 536 at 2, 87th Cong., 1st Sess. (1961); Senate Report No. 1992 at 2, 87th Cong., 2d Sess. (1962).

The statute addresses one who "*is*" an officer or employee "*acting* in his official capacity or under color of legal authority" (emphasis added). The actual wording of the statute cannot be read to cover damage actions brought against officials based on past conduct and which seek recovery from their private resources.

Judge Friendly looked beyond the language of the statute in rejecting an earlier attempt to expand the scope of Section 1391(e). He cautioned that it cannot be construed:

> "simply as a text to be parsed with such aid as the dictionary and grammar afford and without adequately considering the history of the statute and the evil it was designed to cure." *Natural Resources Defense Council, Inc.* v. *TVA*, 459 F.2d 255, 257 (2d Cir. 1972).

When the history of the statute is fairly considered and the narrow problem sought to be remedied is recognized, the error of the decision below clearly emerges.

A. Section 1391(e) is limited to actions in the nature of mandamus, which were formerly restricted to the District Of Columbia.

Before the passage of the Mandamus and Venue Act, federal district courts outside the District of Columbia lacked subject matter jurisdiction to direct writs of mandamus to federal officials. Soon after the passage of the Judiciary Act of 1789, 1 Stat. 78, it was held that Congress had not granted the federal trial courts power to issue the writ. *McIntire* v. *Wood*, 11 U.S. (7 Cranch) 503 (1813). The federal courts in the District of Columbia, which inherited the power to issue the writ from the common law of the State of Maryland, were the sole exception to this rule. *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838).

The result of this historical accident was that virtually all non-statutory review actions had to be brought in the District of Columbia. This presented numerous problems of judicial administration and made it difficult for those living far from Washington to secure relief which only mandamus could provide. Section 1 of the Mandamus and Venue Act, now 28 U.S.C. §1361, alleviated one aspect of this problem by conferring mandamus jurisdiction on every federal district court. *See* House Report No. 536 at 3, 87th Cong., 1st Sess. (1961) ("House Report"). However, this grant of subject matter jurisdiction, standing by itself, was insufficient to permit non-statutory review actions to be

maintained outside the District of Columbia because of certain restrictions on service of process and venue.

In most cases which sought mandamus relief, a superior federal official was an indispensible party. 3 K. Davis, *Administrative Law Treatise* §27.08 (1st ed. 1958). Because of the legal fiction that these officials resided only where they were stationed, usually the District of Columbia, effective service on them could not be made anywhere else. *Martinez* v. *Seaton*, 285 F.2d 587, 589 (10th Cir. 1961). Finally, because of the venue provisions then in effect, the joinder of such an official restricted the action to the District of Columbia. *See* Note, *Developments in the Law - Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 924 (1957); 28 U.S.C. §1391(b) (1949), *amended in* Pub. L. 89-714, 80 Stat. 1111 (1966).

The statute was meant to do no more than remove these technical impediments, which limited certain actions to the District of Columbia. The House Judiciary Committee, in its report approving the bill, stated:

> "The purpose of this bill is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." House Report at 1.

Virtually the same language was used in the report of the Senate Judiciary Committee. Senate Report No. 1992 at 1, 87th Cong., 2d Sess. (1962) ("Senate Report").

The legislative history of the statute is equally clear about what it was not intended to do:

> "This bill is not intended to give access to the Federal courts to an action which cannot be brought against a Federal official in the U.S. District Court for the District of Columbia." *Id.* at 2. [3]

In two decisions Judge Friendly, consistent with this legislative history, declined to extend the scope of Section 1391(e) beyond suits which previously could have been brought only in the District of Columbia. *Natural Resources Defense Council, Inc.* v. *TVA*, 459 F.2d 255 (2d Cir. 1972); *Liberation News Service* v. *Eastland*, 426 F.2d 1379. (2d Cir. 1970).

In *Natural Resources Defense Council*, plaintiffs sued the TVA and several of its officials in the Southern District of New York. In opposition to the defendants' motion to dismiss, plaintiffs relied on Section 1391(e) to supply venue. Because the TVA is undoubtedly an "agency of the United States," *Tennessee Valley Authority* v. *Kinzer*, 142 F.2d 833 (6th Cir. 1944), and its personnel are clearly governmental officers or employees, *Posey* v. *Tennessee Valley Authority*, 93 F.2d 726 (5th Cir. 1937), the statute's literal language applies to the suit. The Second Circuit held, however, that the statute was inapplicable because a suit such as this was not, prior to the passage of Section 1391(e), limited to the District of Columbia:

> "It did not come within the "mischief" at which the new statute was directed, and to which the Committee said it was limited. TVA had always been suable, subject to the same venue limitations as any

3. In *Schlanger* v. *Seamans*, 401 U.S. 487 (1971), this Court dealt with a claim that the statute covered habeas corpus proceedings, which are technically within the scope of the term "civil action". For the Court, Mr. Justice Douglas wrote:

> "Although by 28 U.S.C. §1391(e) (1964 ed., Supp. V), Congress has provided for nationwide service of process in a 'civil action in which each defendant is an officer or employee of the United States,' the legislative history of that section is barren of any indication that Congress extended habeas corpus jurisdiction. *That section was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia.*" *Id.* at 490 n.4 (emphasis added).

> other corporation, not only in its congressionally fixed residence, the Northern District of Alabama, but in any district where it did business. Unlike the local postmaster or federal land agent, it could never have defeated venue in a suit for damages or declaratory or injunctive relief, which was otherwise proper, on a plea that the suit would lie only in the District of Columbia, since it had no superior in the capital." 459 F.2d at 259. [4]

This action against petitioners would not have been restricted to the District of Columbia before the passage of the Mandamus and Venue Act. Federal officers have always been amenable to suit in actions seeking damages for wrongful acts performed under color of law, subject to the ordinary rules governing jurisdiction and venue. Note, *Developments in the Law - Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 832 (1957); *see Mitchell* v. *Harmony*, 54 U.S. (15 How.) 115 (1852).

The legislative history is clear that an action like this, which could always have been brought outside the District, is not governed by Section 1391(e). Indeed, petitioners, who reside and are stationed in Florida could not have been sued in Washington under any circumstances.[5] Respondents have attempted to stand the statute on its head. Rather than using the statute to commence an action locally which could formerly have been brought only in

4. *Liberation News Service* reached a similar conclusion. There, plaintiffs brought an action against the members of a Senate Committee and its chief counsel, seeking relief against an allegedly unconstitutional investigation. After reviewing the history of the statute, the court concluded that it did not apply to members of the legislative branch, even though they might be considered "officers of the United States, and thus within the literal language of §1391(e)." *Compare* 426 F.2d at 1384 *with id.* at 1383.

5. Other than Section 1391(e), there is no possible basis for the exercise of personal jurisdiction over petitioners in Washington. The petitioners are not in any sense present in the District. The allegedly wrongful acts all took place in Florida, where the claimed injuries occurred. *Cf.* D.C. Code §13-343.

Washington, they seek to bring an action in Washington which could only have been brought locally.

In enacting the statute Congress expressed concern with the unfairness which flowed from the requirement that certain actions against federal officials be brought only in the District of Columbia:

> "A person who seeks to have a Federal court compel a Federal official to perform a duty of his office must bring his action in the District Court for the District of Columbia. This the committee considers an unfair imposition upon citizens who seek no more than lawful treatment from their government." House Report at 3; Senate Report at 2-3.

This unfair imposition was never a factor in personal damage actions against federal officials because those suits were never limited to the District of Columbia. To the contrary, requiring a federal official to defend his assets in every district court throughout the nation certainly places an "unfair imposition" on him - an imposition never considered by Congress. Given the express purpose of Section 1391(e), the extreme result reached below cannot be read into the statute.

B. Section 1391(e) is limited to suits brought "in essence against the United States" and only "nominally" against a federal official.

The legislative history makes it apparent that Section 1391(e) applies only to suits which are brought "nominally" against the defendant official and "in essence" against the United States. It does not apply to actions such as this which seek damages from an official's personal resources. The House Report explains:

> "Section 2 is the venue section of the bill. Its purpose is similar to that of section 1. It is designed to permit an action which is *essentially against the*

> *United States* to be brought locally rather than requiring that it be brought in the District of Columbia simply because Washington is the official residence of the officer or agency sued." House Report at 2 (emphasis added); *see* Senate Report at 3-4.

This action against petitioners is not "in essence against the United States"; it seeks a recovery out of their own resources. The only damage actions which are in essence against the United States are those, unlike this case, where the judgment will ultimately "expend itself on the public treasury". *Land* v. *Dollar*, 330 U.S. 731, 738 (1949); *see* 3 K Davis, *Administrative Law Treatise* §27.09 at 610 (1st ed. 1958).

That Section 1391(e) does not apply to damage actions in essence against individual federal officials is apparent on the face of the statute. It is addressed to actions where "a defendant *is* an officer or employee of the United States or any agency thereof *acting* in his official capacity or under color of legal authority." (Emphasis added). The clear import of the use of "is" and "acting", rather than a phrase such as "who has acted", is to limit the statute to suits which seek to control present, ongoing official conduct; a remedy in the nature of mandamus does not include review of past conduct. *See Howe* v. *Attorney General*, 325 Mass. 268, 90 N.E. 2d 316 (1950); 3 BLACKSTONE, COMMENTARIES at 110-113 (10th ed. 1787).

Respondents do not seek to compel a federal official to perform a duty of his office, but to review the conduct of grand jury proceedings which are long since over. The language of the statute, particularly when read together with Section 1361 as it must be, cannot be stretched to cover this action. *Natural Resources Defense Council, Inc.* v. *TVA*, *supra*, at 459 F.2d 258.

In holding that Section 1391(e) is applicable to damage actions in essence against individual federal officials, the

court below relied upon the following passage from the legislative history and its reference to damage actions:

> "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." House Report at 3.

The court erred by taking this sentence out of context and reading it in isolation. The sentence begins by addressing "the venue problem" which the House and Senate Judiciary Committees spent a great deal of effort explaining. Referring specifically to this problem, the Committee Reports say the same problem arises in actions seeking damages against federal officials. However, the venue problem does not arise in all such actions and the Committee Reports do not say that Section 1391(e) is to embrace all damage actions against federal officials.

Indeed, the Committee Reports proceed directly to explain the venue problem further and observe of the actions in which the problem arises "in either event, these are actions which are in essence against the United States." House Report at 3; Senate Report at 3. A fair reading of this passage indicates that Section 1391(e) applies only to those damage actions where the venue problem arose because the action was essentially against the United States.

One of the ordinary functions of mandamus is to force an official to disgorge monies which he is under a ministerial duty to pay, as Judge Prettyman's scholarly opinion demonstrates in *Clackamas County* v. *McKay*, 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909 (1955).[6] Indeed,

6. Other examples of such relief are actions to compel increased pay for federal employees, *Nat'l Treasury Emp. Union* v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974); to compel the Secretary of the Interior to apportion funds under the Federal Aid to Wildlife Restoration Act, 16 U.S.C. §669 *et seq.*, *Udall* v. *Wisconsin*, 306 F.2d 790 (D.C. Cir. 1962), *cert. denied*

the case which established the mandamus jurisdiction of the District of Columbia ordered payments to be made by the Postmaster General. *Kendall* v. *United States ex. rel. Stokes, supra.* In such cases, the need to join a superior federal official and the restrictive venue and service provisions then in effect often limited the trial to Washington. *See, e.g., Webster* v. *Fall*, 266 U.S. 507 (1925). In those "damage" actions the official was sued to circumvent the bar of sovereign immunity, but he was not personally liable for the judgment. Only those actions for money judgments in which the official is a nominal defendant are included within the statute.

In fact, when Section 1391(e) was enacted, damage suits such as this action brought in essence against federal officials were unknown in the federal courts. Official immunity was then thought to be so broad as absolutely to preclude damage recoveries in such cases. *See Barr* v. *Matteo*, 360 U.S. 564 (1959). Even an allegedly unconstitutional imprisonment motivated by malice was held to be absolutely privileged. *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949) (L. Hand, *J.*). *Cf. Butz* v. *Economou*, 98 S.Ct. 2894 (1978). Similarly, in 1962 it was not established that a federal claim could be stated for wrongs such as those alleged here. *Compare Bell* v. *Hood*, 327 U.S. 678 (1946) *with Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963); *see Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

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371 U.S. 969 (1963); to pay servicemen their reenlistment bonuses, *Caola* v. *United States*, 404 F. Supp. 1101 (D. Conn. 1975); to compel the Secretary of Health, Education and Welfare to increase AABD cash benefits; *Lyons* v. *Weinberger*, 376 F. Supp. 248 (S.D.N.Y. 1974); to recover benefits under a veteran's insurance policy, *Kapourelos* v. *United States*, 306 F. Supp. 1034 (E.D. Pa. 1969), *aff'd*, 446 F.2d 1181 (3d Cir. 1971); or to compel the corporation of Washington, D. C. to pay one-half of the cost of building a bridge. *United States ex rel. Treasurer of Washington County* v. *Corporation of Washington*, Fed. Cas. No 16,646 (C.C.D.D.C. 1819).

No tenable reason is suggested why Congress should be presumed to have enacted a statute governing jurisdiction in actions which were then non-existent.

Nor does the statute's use of the phrase "under color of legal authority" bring this case within its ambit. The legislative history is clear that this phrase was used in the act for a narrow purpose which does not embrace suits against a federal official unless they are in essence against the United States:

> "By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed Section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. *It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also in essence against the United States, but are brought against the officer or employee as an individual only to circumvent what remains of the doctrine of sovereign immunity.* The considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions *where the action is based upon the fiction that the officer is acting as an individual. There in no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned."* House Report at 3-4 (emphasis added).

As this passage indicates, the use of "under color of legal authority" was necessary to afford relief to a plaintiff who seeks to control governmental conduct which is technically not "official" because it is beyond the scope of constitutional or statutory authority. *See Ex parte Young*, 209 U.S. 123 (1908). Such language was only intended to accomplish

this purpose in actions nominally against an official. To bring damage actions against petitioners within the coverage of Section 1391(e) would be to push it far beyond the bounds recognized by its draftsman.

C. Section 1391(e) is limited to venue and service of process; it does not alone supply *in personam* jurisdiction.

The court of appeals held that petitioners were subject to *in personam* jurisdiction in the District of Columbia because they were served with process by mail in Florida, pursuant to Rule 4 of the Federal Rules of Civil Procedure as modified by the second paragraph of Section 1391(e). The court viewed Section 1391(e) not only as providing a mechanism for service, but as conferring nationwide *in personam* jurisdiction.

On its face Section 1391(e) governs nothing more than the mechanics of service and where process can be delivered; it consequently makes a defendant amenable to suit only when *in personam* jurisdiction is otherwise independently established. *United States ex rel. Rudick* v. *Laird*, 412 F.2d 16, 20 (2d Cir. 1969), *cert. denied*, 396 U.S. 918 (1969); *Smith* v. *Campbell*, 450 F.2d 829 (9th Cir. 1971).

The court below blurred the critical distinction between service of process and *in personam* jurisdiction. The court held that federal statutes which provide for service of process necessarily imply a grant of *in personam* jurisdiction over any person so served.

It is certainly not the rule that service of process under the federal rules by itself confers *in personam* jurisdiction. *Arrowsmith* v. *United Press International*, 320 F.2d 219, 224-26 (2d Cir. 1963); *Petrol Shipping Corp.* v. *Kingdom of Greece*, 360 F.2d 103 (2d Cir. 1966), *cert. denied*, 385 U.S. 931 (1966); 4 Wright and Miller, *Federal Practice and Procedure* at 205-06 (1969).

The legislative history of the statute clearly indicates that this service provision was intended only to modify the non-jurisdictional provisions of Rule 4:

> "In order to give effect to the broadened venue provision of this bill, it is necessary to modify the service requirements under the Federal Rules of Civil Procedure insofar as they apply to actions made possible by this bill. Rule 4(f) restricts effective service to the territorial limits of a State in which the district court is held unless a statute specifically provides for it to go beyond the territorial limits of that State. Since this bill is designed to make a Federal official or agency amenable to suit locally, *the bill provides that the delivery of the summons and complaint to the officer or agency may be made by certified mail outside of the territorial limits of the district in which the action is brought. In all other respects, the summons and complaint is to be served as provided by the Federal Rules of Civil Procedure.*" House Report at 4 (emphasis added).

This language reflects the limited purpose of the statute which is concerned solely with, as the words of the statute indicate, "delivery of the summons and complaint" and not with *in personam* jurisdiction as the court below concluded. *But see* Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1514, n.118 (1962). The distinction between *in personam* jurisdiction and the mechanisms for service of process have frequently been recognized by Congress. For example, in the District of Columbia Code, Section 13-423 governs "personal jurisdiction based upon conduct" whereas Section 13-431 separately addresses "manner and proof of service."

This Court recognized that Congress has "clearly expressed" any departures from the traditional rules of *in personam* jurisdiction. *Robertson* v. *Railroad Labor Board*, *supra*, at 268 U.S. 627. For example, in Section 10 of the

Sherman Act, 15 U.S.C. §10, Congress was specific in providing that nonresidents may be summoned—it did more than merely modify rules governing service of process. There is no similar clear expression regarding Section 1391(e).

It seems evident that when Congress considered the Mandamus and Venue Act it was not concerned with nor did it directly address problems of *in personam* jurisdiction. The problem before Congress concerned only venue and mechanics of service of process. In the cases which Congress addressed, suits in essence against the United States, *in personam* jurisdiction over the superior government officer was not a problem; it already existed by reason of these officers' "presence" throughout the United States. *Strait* v. *Laird*, 406 U.S. 341, 345 (1972).

Given that such officers were subject to *in personam* jurisdiction, the problem remained that the Federal Rules did not permit delivery of process to them other than within the territorial boundaries of Washington, D.C. *E.g.*, *Martinez* v. *Seaton*, 285 F.2d 587, 589 (10th Cir. 1961). All that was required to remedy the problem which concerned Congress was a mechanism which would permit delivery of a summons beyond the territorial limits of the district to effect *in personam* jurisdiction which could otherwise be established.

D. The Court below erred in relying upon unpreferred sources of legislative history.

The court below was unable to reconcile its decision with the express purpose of the statute to permit suits which were then restricted to Washington to be brought elsewhere; with the clear legislative intent to limit the statute to actions in essence against the United States; with the actual wording of the statute; and with the failure of the statute to address *in personam* jurisdiction.

The court ultimately rested its decision upon isolated and inconclusive conversations in committee hearings and documents authored by opponents of the statute. Chief among these is a February 28, 1962 letter from Deputy Attorney General Byron R. White to the Chairman of the Committee on the Judiciary which questions the wisdom of the legislation and suggests an entirely revised draft. As this Court recently observed:

> "Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203-04 n.24 (1976).

In any event, however much weight this letter should be given in determining legislative intent, upon analysis it is inconclusive. In this letter, the Department of Justice suggested, among other things, that the venue provision be tied "directly" to the Administrative Procedure Act:

> "The Administrative Procedure Act contains an expression of existing congressional purpose relating to review of the acts of Federal officers. For venue reasons, however, practically all proceedings for review under that act must be brought in the District of Columbia. We believe that less confusion will result by tying in this simple venue grant directly to the Administrative Procedure Act. *This unquestionably eliminates suits for money judgments against officers*, eliminates any question that a discretionary action can be reviewed, and requires an exhaustion of administrative remedies. It will do away with any possible future contention that the legislation was intended to add any additional substantive right of appeal. *It would thus achieve what we understand to be the purpose of the sponsors within the framework of existing legislation.*" Senate Report at 6 (emphasis added).

The court of appeals concluded that since Congress did not adopt this suggestion it must have intended Section 1391(e) to cover personal damage actions. This is too weak a reed upon which to base such a conclusion. Indeed, the paragraph suggests the contrary. It does not propose a change in the legislative purpose, but seeks to clarify it. Among the problems foreseen to be avoided was a future claim that the statute covers actions for money judgments against officers, contrary to the purpose of the sponsors.

The sponsor of the bill, Representative Hamer H. Budge of Idaho, stated in his final words to the House Committee:

> "I have no intention of bringing tort actions against individual government employees. All I am seeking to do is to have the review of their official actions take place in the United States District Court where the determination was made." Hearings on H.R. 10089 Before the House Comm. on the Judiciary (Subcommittee No. 4), 86th Cong., 2d Sess. 102 (June 2, 1960).

Rather than assume that Congress intended Section 1391(e) to cover personal damage actions, it is more likely that Congress believed that the Committee Reports were so clear that they left no basis for the confusion which the Department suggested might arise. *See* 1962 Cong. Record 20,079 (Sept. 20, 1962); 2A Sutherland, *Statutes and Statutory Construction* §48.18 (4th ed. Sands 1972). Indeed, this may be the reason that the Committee Reports stated time and time again that the statute was intended to cover only actions which could have been brought in the District of Columbia and actions brought "in essence against the United States."

The *Driver* court frankly observed that "[t]he legislative history of §1391(e) is at best ambiguous ...." *Driver* v. *Helms*, *supra*, 577 F.2d at 152. The relevant inquiry should be how the ambiguity, if it exists, can be resolved.[7]

In *Robertson* v. *Railroad Labor Board*, *supra*, the Court addressed a similar problem. It stated:

> "By the general rule the jurisdiction of a district court *in personam* has been limited to the district of which the defendant is an inhabitant or in which he can be found." 268 U.S. at 627.

Mr. Justice Brandeis then reviewed the instances in which "Congress ... made a few *clearly expressed* and *carefully guarded* exceptions to the general rule...." *Id.* at 624 (emphasis added). He cautioned that:

> "It is not lightly to be assumed that Congress intended to depart from a long established policy." *Id.* at 627.

If Section 1391(e) were a grant of nationwide *in personam* jurisdiction, it would be an unprecedented and radical departure from the general rule which Congress has consistently observed. Indeed, this construction raises "serious doubt of constitutionality" which alone is reason for its rejection. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, *J.*).

> "Where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects." *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 362 (1805).

7. We do not view the legislative history as ambiguous because of the statute's clearly stated purpose. We raise this question only in the event the Court finds any ambiguity.

If there is any ambiguity in the statute, it must be resolved against an expansive jurisdictional construction.

II

The interpretation given to Section 1391(e) by the court below would render its application to petitioners unconstitutional since they would be denied due process of law.

Congress has traditionally followed the general rule developed at common law that "the jurisdiction of a district court *in personam* is limited to the district of which the defendant is an inhabitant or in which he can be found." *Robertson* v. *Railroad Labor Board, supra*, 268 U.S. at 627. Similarly, the Court has followed this general rule, which now reflects a broader concept of "presence", in determining the jurisdictional reach of federal courts under federal statutes. *Strait* v. *Laird*, 406 U.S. 341, 345 n.2 (1972).

Some federal statutes depart from the general rule, but each is "carefully guarded" so that well developed notions of fundamental fairness to the defendant remain undisturbed. *Robertson* v. *Railroad Labor Board, supra*, 268 U.S. at 624-625, 627; Pet. App. J, pp. 125a-127a. It is for this reason, we submit, that the Court has not decided the precise constitutional issue presented, although this important issue has been identified and decision reserved. *United States* v. *Scophony Corp.*, 333 U.S. 795, 804 n.13 (1948). *See Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1270 n.29 (5th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3450 (Jan. 8, 1979). *Cf. Yakus* v. *United States*, 321 U.S. 414, 437 n.5 (1944).

If Section 1391(e) subjects federal officials sued for damages in their personal capacities to *in personam* jurisdiction in every district court throughout the nation, its application to petitioners, with no nexus to the forum, is fundamentally unfair. Petitioners are deprived of fifth amendment due process because of the intolerable burden on their right to defend.

This constitutional question tests the utmost reach of congressional power: whether traditional notions of fair play and substantial justice inherent in the fifth amendment limit the exercise of Congressional power to provide nationwide *in personam* jurisdiction.[8] Although the contours of due process are not always precise, certain concrete principles have been firmly established.

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.*** Although 'many controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court***'there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and *opportunity for hearing appropriate to the nature of the case.*' " *Boddie* v. *Connecticut*, 401 U.S. 371, 377-78 (1971) (emphasis added).

While *Boddie* is a fourteenth amendment case, the opinion makes clear that the right to an opportunity to defend is central to fifth amendment due process as well. *Id.* at 375; *Yakus* v. *United States, supra*, 321 U.S. at 433, 443-444; American Law Institute, Restatement of the Law (Second), Conflict of Laws §25 (1971).

There has been little written concerning fifth amendment limitations on the exercise of *in personam* jurisdiction.

8. In *Robertson* v. *Railroad Labor Board, supra*, 268 U.S. at 622, the Court said that "Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court." *Accord*, *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438, 442 (1946); *Yakus* v. *United States, supra*, 321 U.S. at 433. The Court has not, however, determined the extent to which fifth amendment due process imposes limitations on the exercise of that power.

However, useful analogies can be drawn from fourteenth amendment cases. The exercise of *in personam* jurisdiction may not offend "traditional notions of fair play and substantial justice." *E.g.*, *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). The court of appeals viewed fourteenth amendment cases as totally irrelevant in a fifth amendment context and this, we submit, is error. Other federal courts have asserted differing positions on this issue. *Compare Honeywell, Inc.* v. *Metz Apparatewerke*, 509 F.2d 1137, 1143 (7th Cir. 1975), *with Oxford First Corp.* v. *PNC Liquidating Corp.*, 372 F.Supp. 191, 198 (E.D. Pa. 1974).

The court of appeals did not recognize that the *in personam* reach of the state courts has been examined by this Court on two distinct levels:

The first level deals with the relations among the states in terms of territorial sovereignty. This analysis helps to explain the second level, but it has nothing to do with the fifth amendment problem. Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. Chi. L. Rev. 775, 791 *etseq.* (1955).

The second level concerns fourteenth amendment due process and the right to defend. This second level analysis is useful in considering fifth amendment limitations on the exercise of Congress' power because it, like the fourteenth amendment, reflects "traditional notions of fair play and substantial justice."

(1) The first level of analysis which the court below appeared to view as the underpinning of the *International Shoe* line of cases does not concern due process at all. Prior to the adoption of the fourteenth amendment in 1868, a state could render an *in personam* judgment against a non-resident who did not submit to jurisdiction. The effect of such a judgment in the rendering state was solely a matter of that state's law; no protection was afforded to a defendant by the Constitution. *Baker* v. *Baker, Eccles & Co.*, 242

U.S. 394, 402-3 (1917). Such a judgment was not entitled to full faith and credit outside the rendering state, but this was not due to any constitutional prohibition. Rather, "fundamental principles of justice and the rules of international law as they existed among the States at the inception of the Government", *id.* at 401, permitted sister states to decline to enforce such *in personam* judgments.

The operative rule was that "no State can exercise direct jurisdiction and authority over persons or property without its territory." *Pennoyer* v. *Neff*, 95 U.S. 714 (1877). The rule regulated the relationships among the states which were viewed as independent sovereigns. An extra-territorial assertion of jurisdiction by one state would offend sister states and exceed the inherent limits of its power. *Shaffer* v. *Heitner*, 433 U.S. 186 (1977). Prior to the fourteenth amendment, non-resident defendants derived protection from this rule merely as incidental beneficiaries.

While this principle of sovereignty lost importance after the fourteenth amendment, it continued to be expressed. *Compare Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958), *with Shaffer* v. *Heitner*, *supra*, 433 U.S. at 204 n.20.

Insofar as this Court's prior decisions concerning the breadth of state *in personam* jurisdiction relied on principles of state sovereignty, they are not relevant to fifth amendment analysis because there is nothing "extra-territorial" about the exercise of nationwide *in personam* jurisdiction by the United States. *Mariash* v. *Morrill* 496 F.2d 1138 (2d Cir. 1974).

(2) The second level of analysis reflected in the *International Shoe* line of cases treats the due process problem. It concerns limitations on the exercise of *in personam* jurisdiction both within and outside the territory of a state. Since this analysis considers fundamental fairness and not territorial power, it is relevant to both fourteenth and fifth amendment cases.

The fourteenth amendment rendered an *in personam* judgment against a non-resident who did not submit to jurisdiction void in the rendering state:

> "the effect of the 'due process' clause of that Amendment being*** to establish it as the law for all the States that a judgment rendered against a non-resident who had neither been served with process nor appeared in the suit was devoid of validity within as well as without the territory of the State whose court had rendered it, and to make the assertion of its invalidity a matter of federal right." *Baker* v. *Baker, Eccles & Co., supra*, 242 U.S. at 403.

The Court observed:

> "The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard." *Id.*

The right to be heard is not satisfied merely by adequate notice. The convenience or hardship of the forum to the defendant is also a factor:

> "To hold one bound by the judgment who has not had such opportunity is contrary to the first principles of justice. And to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a State beyond its own territory." *Id. See also, Roller* v. *Holly*, 176 U.S. 398, 408-9 (1900).

The analysis used in fourteenth amendment cases protects the right to defend from the burden imposed by forcing one to litigate in an inconvenient forum. It is based on considerations of fundamental fairness, not territorial sovereignty, and is applicable to fifth amendment cases.

(3) Contemporary analysis of due process begins with *International Shoe Co.* v. *Washington, supra*, 326 U.S. 310. Its

"minimum contacts" test was not grounded upon historical concepts of territorial sovereignty or the *de facto* power which a state may have over a defendant's person. *Id.* at 316. Rather, the demands of due process are satisfied only when it is reasonable to require one to defend a particular suit in a particular forum. *Id.* at 317. As the Court explained:

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Id.* at 319.

In setting forth the due process standard the Court employed the analysis of Judge Learned Hand in *Hutchinson* v. *Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930):

> "An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection." *International Shoe, supra*, 326 U.S. at 317.

Without a sufficient nexus between the defendant and the forum, to require him to defend away from home "has been thought to lay too great and unreasonable a burden ... to comport with due process." *Id.*

This undue hardship, it is submitted, is as great and unreasonable when it is imposed in federal question cases in the district courts as in the state courts.

The unreasonable burden is prohibited by the fifth amendment for the same reason that it is prohibited by the fourteenth amendment. It imposes an intolerable hardship on the right to defend.

International Shoe recognizes that "presence" in the territory of the forum and its consequent power to assert control over the defendant does not end the jurisdictional inquiry. *Shaffer* v. *Heitner, supra*, confirmed this when it rejected the

conceptual structure of *Pennoyer* v. *Neff* and recognized that "the theory that territorial power is both essential to and sufficient for jurisdiction has been undermined". 433 U.S. at 211. *Shaffer* concluded that territorial power aside, "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id.* at 212.

The court of appeals failed to recognize that *International Shoe* and *Shaffer* rely upon doctrines of fundamental fairness, rather than territorial sovereignty.

(4) Since it is burdensome to conduct litigation away from home it is fairer that a plaintiff, who initiates the process by bare allegations, go to the forum of the defendant than that the defendant be required to travel to the plaintiff. *Hutchinson* v. *Chase & Gilbert, Inc., supra*, 45 F.2d at 142.

In *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), the Court recognized "the substantial financial burden and personal strain of litigating" in a state forum 3,000 miles from a defendant's home. In the absence of "affiliating circumstances" connecting the defendant to the forum, basic considerations of fairness require the plaintiff rather than the defendant to assume this burden. *Id.* at 97.

When a plaintiff initiates an action the defendant is immediately subjected to an array of obligations.

> "[T]he successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' right. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy." *Boddie* v. *Connecticut*, *supra*, 401 U.S. at 376.

It is evident that full access is not afforded if the defendant must assume an unreasonable hardship in order to be physically present at the place of trial.

Mr. Justice Black recognized that the burdens imposed by distant litigation can be severe: traveling to a strange court in a strange city, inducing witnesses to travel there and to testify, hiring distant and unfamiliar counsel, and paying one's own and their witnesses' hotel bills and other expenses. *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 325-330 (1964) (dissenting). When added to the ordeal of the trial itself, in which one's private assets are at risk, this burden is clearly a serious handicap in presenting an adequate defense. The consequent advantage to the plaintiff places the litigants in such an unequal posture that it denies due process to the defendant.

The right to defend locally has long been recognized as protecting against the power which can be wielded by a vindictive plaintiff. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth And Forum Conveniens*, 65 YALE L. J. 289, 296, *et. seq.* (1956); *see also*, Von Mehren and Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127-1128 (1966). Indeed, the *in terrorem* effect of having to defend far from home and absorb the consequent expense places undue pressure on the defendant to settle groundless claims or forego meritorious defenses. *Cf. Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740-41 (1975).

The court of appeals held that Congress can subject a defendant to *in personam* jurisdiction in any federal forum— the degree of the burden imposed on a defendant whose property may be taken is not relevant. But the implicit premise is that Congress can impose a fundamentally unfair burden on the right to defend.

(5) The court of appeals reasoned that since Congress could draw the boundaries of the federal district courts

without regard to state lines there can be no constitutional limitation on the jurisdictional reach of the district courts. Similarly, the court suggested that Congress could reduce the number of district courts, perhaps to one, and in this event permissible nationwide *in personam* jurisdiction would follow. *Cf.* Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L. J. 498 (1974). This reasoning begs the question.[9] Although Congress may have the power suggested, the pivotal question remains whether the exercise of jurisdiction by any such court would impose an undue hardship on the right to defend and thus violate due process. Foster, *Long-Arm Jurisdiction in Federal Courts*, 1969 WISC. L. REV. 22, 36. *See* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, 437 n.2 (Official Draft 1969).

(6) The court of appeals viewed a motion for change of venue under 28 U.S.C. §1404(a) as an adequate remedy if an exercise of *in personam* jurisdiction is fundamentally unfair. This misapprehends the nature of venue and due process.

Venue concerns the relative convenience of all of the parties and the witnesses. Thus the rule is that "where the transfer would merely shift the inconvenience from one party to the other, the Motion for Change of Venue should be denied." *Crossroads State Bank* v. *Savage*, 436 F. Supp. 743, 745 (W.D. Okla. 1977). Here the burden on petitioners alone, however great, would not be sufficient to cause a change of venue. On the other hand, due process considers only the burden on a defendant's opportunity to defend:

> "Procedural due process is not intended to promote efficiency or accomodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken." *Fuentes* v. *Shevin*, 407 U.S. 67, 90 n.22 (1972).

9. This is certainly not a case where a national emergency requires one court to determine a specific class of cases. *Cf. Yakus* v. *United States*, *supra*, at 432-33.

(7) Finally, it has been suggested that officers of the federal government are different from private defendants because their official acts may affect people in every part of the United States. When a federal employee is sued for damages in his personal capacity in a distant forum he faces the same hardships as any other private defendant. In the face of these hardships, due process is not satisfied merely because a person is employed to serve his government.

The Court in *Shaffer* v. *Heitner* rejected the similar argument that officers of Delaware corporations can be subjected to jurisdiction in Delaware merely because they are officers. The argument simply fails to recognize the requirement of fairness. 433 U.S. at 192. Merely that one is a federal official does not demonstrate that requiring him to defend in a particular forum is fair.

(8) If Section 1391(e) confers nationwide *in personam* jurisdiction, without regard to the burden imposed upon a defendant, it is a radical departure from our traditional notions of fair play. Every nationwide service provision heretofore enacted by Congress has been carefully guarded and restricted to comply with the requirement of fundamental fairness. Foster, *Long-Arm Jurisdiction* in *Federal Courts*, 1969 WISC. L. REV. 27, 34; Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520 (1963). If Congress meant to reject its heretofore self-imposed limitations in this sensitive area, it would have made its intentions unmistakably clear.

An interpretation of Section 1391(e) which limits its application to federal officials sued in their official capacities or nominally in their individual capacities in suits in essence against the United States presents no due process

problem. In their official capacities, officials are "present" throughout the nation, through the "hierarchy of command", *Strait* v. *Laird, supra*, 406 U.S. at 345; thus nc question of fundamental fairness is raised.

To interpret Section 1391(e) as granting *in personam* jurisdiction over officials sued in their personal capacities in any court in the land, without any traditional affiliating circumstances, would be fundamentally unfair and therefore unconstitutional under the due process clause of the fifth amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: New York, New York
March 1, 1979

Respectfully submitted,

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FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1546

WILLIAM H. STAFFORD, JR., STUART J. CARROUTH, and CLAUDE MEADOW,

Petitioners,

—v.—

JOHN BRIGGS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the court of appeals (Pet.App. A at 1a-19a) is reported at

569 F.2d 1. The opinion of the district court (Pet.App. C at 25a-26a) is not reported.

STATUTE INVOLVED

PUBLIC LAW 87-784; 76 STAT. 744

[H.R. 1960]

An Act to amend chapter 85 of title 28 of the United States Code relating to the jurisdiction of the United States district courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Chapter 85 of title 28 of the United States Code 24 is amended - (a) By adding at the end thereof the following new section: "§1361. Action to compel an officer of the United States to perform his duty

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

(b) By adding at the end of the table of sections for chapter 85 of title 28 of the United States Code the following:

"1361. Action to compel an officer of the United States to perform his duty."

Sec. 2 Section 1391 of title 28 of the United States Code is amended by adding at the end thereof the following new subsection: "(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated or (4) the plaintiff resides if no real property is involved in the action.

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

Approved October 5, 1962. 1/

1/ 28 U.S.C. §1391(e) as amended in 1976, includes the following sentence after the last sentence of the first paragraph:

(fn. cont. next page)

COUNTER STATEMENT OF THE CASE

The proceeding herein arises out of an action for declaratory relief and for damages for violation of respondents' constitutional and civil rights. This civil suit concerns action by a number of government officials in relation to a prosecution which emerged as United States v. Camil, GCR 1344 (N.D. Fla.) and super-

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(fn. cont'd)

> Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

In addition, the word "each" in the first paragraph of §1391(e) is changed to "a." P.L. 94-574, §3, 90 Stat. 2721 (Oct. 21, 1976).

ceding indictment and trial in United States v. Briggs, GCR 1353 (N.D. Fla.)[2/] The issues herein are purely procedural and relate to venue and personal jurisdiction.[3/]

2/ Respondents are the plaintiffs in the case sub judice. Eight of them were defendants in the criminal case, United States v. Briggs, supra. They were found not guilty after a jury trial. The other two respondents were held in contempt for refusing to answer questions before the grand jury. Their convictions were reversed on appeal. Beverly v. United States, 468 F.2d 732 (5th Cir., 1972). See also United States v. Briggs, 514 F.2d 794 (5th Cir., 1975). Petitioners are three of the four defendants in the civil action Briggs, et al. v. Goodwin, et al. Their co-defendant, Guy Goodwin, is not a party to this proceeding. See n. 4 infra.

3/ Questions of prosecutorial immunity are not involved at this time. Defendant Goodwin, but not petitioners, moved to dismiss the complaint against himself on grounds of prosecutorial immunity. The district court denied the motion (Pet.App. at 20a-23a) and the court of appeals having accepted certification, affirmed. Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir., 1977), cert. denied, 437 U.S. 904 (1978).

The three petitioners, together with defendant Goodwin,[4] are being sued for civil actions taken by them under color of law and in their official roles as federal government employees, but beyond the scope of their authority.[5] These actions occurred during a grand jury proceeding and subsequent criminal prosecution.

The gravamen of this action is that petitioners together with defendant Goodwin, an attorney for the Department of Justice, Division of Internal Security, conspired to violate respondents' rights under the First, Fourth, Fifth, Sixth,

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4/ The action against Goodwin is proceeding in the District Court. See discussion infra at 15.

5/ The complaint and amendment to complaint are printed in the Appendix (App. at 8-31).

Eighth, and Ninth Amendments, by arranging the presence of one or more informers among grand jury witnesses and in the defense camp of United States v. Briggs, supra, and concealing such arrangement by perjury before the District Court.

More specifically, respondents allege that petitioners and defendant Goodwin were responsible for conducting the grand jury investigation to which respondents and thirteen other members of the Vietnam Veterans Against the War were subpoenaed. They were summoned from such widely scattered places as Arkansas, Delaware, New York, Texas, Louisiana, and Washington, D.C., and required to appear in Tallahassee, Florida, on July 10, 1972, on less than three days' notice. Because many of the subpoenees did not know each other and because they were concerned

about the possibility of infiltration by government agents or informers, respondents, by their attorneys, moved that petitioners and defendant Goodwin be required to disclose whether any of 18 named persons were agents or informers of the government. On the following day, in response to that motion and after argument in open court, the District Court ordered defendant Goodwin to take the stand and the following occurred:

THE COURT:

Mr. Goodwin, take the witness stand. Swear the witness, Mr. Clerk.

thereupon,

GUY GOODWIN

was called as a witness, having been first duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE COURT:

Mr. Goodwin, are any of these witnesses represented by counsel agents or informants of the United States of America?

THE WITNESS:

No, Your Honor.

THE COURT:

You can step down.

(Witness excused.)

MR. LEVINE:

Your Honor, may we be permitted to question Mr. Goodwin on this?

THE COURT:

No, unless you have some information that is contrary to what counsel for the Government has testified.[6/]

6/ The last nine words of the above collaqry does not appear in the exhibit to the complaint which is printed in the Appendix (App. at 27-28). The actual record of the grand jury proceeding shows that the colloquy continued for another five pages,

(fn. cont. next page)

The complaint alleges that the defendant Goodwin made the foregoing representation "on behalf of all defendants [including petitioners] and with their full knowledge." (App. at 13).

More than one year later, in the midst of the trial of United States v. Briggs, et al., supra, one of the 18 named persons, Emerson L. Poe, was revealed to have been a paid FBI informer for more than six months prior to defendant Goodwin's testimony. He surfaced as an

(fn. cont'd)

in which counsel for the witnesses sought to cross-examine Mr. Goodwin. The court declined to permit them to do so. Mr. Goodwin from the witness stand, said: "I do not wish to be subjected to cross examination." In a number of different ways, Mr. Goodwin reaffirmed that none of the 18 people who were named were government informers. (Transcript of Proceeding, United States District Court, Northern District of Florida, Tallahassee Division, In re Grand Jury Witnesses, Case No. T. Misc. No. 1/122, July 13, 1972 at Tr. 65 to 73). Excerpts reprinted infra at 22a-29a).

informer when he took the witness stand on August 17, 1973 as a major prosecution witness. Poe testified that during the period between defendant Goodwin's sworn testimony quoted above and the time of his own testimony, he reported to petitioner Meadow after each occasion that he saw or spoke with respondent Scott Camil, including every day respondents were before the grand jury.[7/]

Thus, as a direct result of defendant Goodwin's perjury in which the petitioners here are alleged to have conspired, the defense camp in United States v. Briggs, supra, was invaded in violation

7/ Petitioner Meadow was an FBI agent on the case and worked with defendant Goodwin and petitioners Stafford and Carrouth before, during, and after the grand jury period and throughout the trial.

of respondent's rights under the First, Fourth, Fifth, Sixth, Eighth, and Ninth Amendments.

Defendant Goodwin, whose official residence is in Washington, D.C., was personally served with the summons and complaint. The petitioners (Stafford, Carrouth, and Meadow) were all federal employees with offices in Florida at the time this action was commenced and when they were served by certified mail in accordance with 28 U.S.C. §1391(e).

Petitioners and defendant Goodwin all moved for a transfer or change of venue to the United States District Court for the Northern District of Florida, or in the alternative, for a

dismissal as to petitioners Stafford,[8/] Carrouth, and Meadow for a lack of jurisdiction over their persons, improper venue, and insufficiency of process. (App. at 32).

On November 20, 1974 the District Court denied the motion to transfer venue (Pet.App. at 20a-24a). But on March 4, 1975, the District Court dismissed the action as against the petitioners Stafford, Carrouth, and Meadow. It ruled that despite 28 U.S.C. §1391(e), the District Court lacked venue and *in personam* jurisdiction with respect to them (Pet.App. at 25a-26a). A final

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8/ Sometime after the filing of the complaint, petitioner Stafford became a United States District Court judge in the Northern District of Florida and petitioner Carrouth resigned from his government job. Petitioner Meadow and defendant Goodwin are still employed by the government.

judgment of dismissal was entered as to petitioners Stafford, Carrouth, and Meadow (Pet.App. at 27a).

On appeal, the Court of Appeals for the District of Columbia Circuit reversed the dismissal, holding that the clear mandate of 28 U.S.C. §1391(e) is that damage actions against federal officials may be brought in a district where a defendant resides, that venue was proper in the District Court, that extraterritorial service of process on petitioners was proper, and that the statute as thus applied to petitioners did not violate their constitutional rights. (Pet.App. at 1a-19a). The court also denied a petition for rehearing (Pet.App. at 29a) and a suggestion for rehearing en banc. (Pet.App. at 30a). It did allow

petitioners to lodge documents with the Circuit Court. (Pet.App. at 29a).[9/]

The case against defendant Goodwin is proceeding apace in the United States District Court for the District of Columbia. Defendant Goodwin has served his answer; interrogatories have been served and answered; relevant documents have been subpoenaed from the government;

9/ These documents were (1) a letter dated September 25, 1962 from Nicholas Katzenbach, Deputy Attorney General to David Bell, Director of the Bureau of the Budget, printed in the Appendix to the Government brief at 1a, (2) a memorandum dated January 18, 1963 from Deputy Attorney General Katzenbach to all United States Attorneys explaining the workings of the law as approved by the President. Annexed to this brief at 16a is a reprint of relevant portions of that memorandum, (3) a memorandum dated August 22, 1963 from John W. Douglas, Assistant Attorney General, Civil Division, to all United States Attorneys regarding a need to notify the civil division upon filing of a complaint under the new statute.

The government has lodged copies of these documents with the Clerk of this Court.

and depositions are being scheduled.

The issue posed by this case is not whether the respondents may proceed against defendant Goodwin in the District of Columbia, for that right has already been established. The issue here is whether, in the same lawsuit, respondent also may proceed against the petitioners who respondents claim were co-conspirators with defendant Goodwin. If not, then in order to proceed against the petitioners, the respondents will have to either (a) bifurcate their lawsuit, by having one proceeding in Florida, and an independent proceeding in the District of Columbia, or (b) if they wish to avoid such bifurcation, accede to defendant Goodwin's motion to move his case to Florida too.

Summary of Argument

1. 28 U.S.C. §1391(e) provides that a civil action in which a defendant is an officer or employee of the United States, acting in his official capacity or under color of legal authority, may be brought in any judicial district in which a defendant in the action resides, and the delivery of a summons and complaint may be made by certified mail beyond the territorial limits of the district in which the action is brought.

The case at bar, according to the allegations of the complaint, falls exactly within the statute.

Respondents brought their suit against the four defendants in this action in the District of Columbia, which they were authorized to do under 28 U.S.C. §1391(e). That statute represehted a major effort by Congress to facilitate suits by private individuals claiming that federal officials violated their rights.

The main thrust of petitioners' argument is that 28 U.S.C. §1391(e) is limited to mandamus-type actions and does not include damage actions.

There is nothing in the language of the statute which justifies such a reading. Indeed, it is particularly difficult to sustain such a reading in light of the fact that §1391(e) was enacted together with another statutory provision which did specifically address the question of mandamus actions (28 U.S.C. §1361). Had the Congress intended that §1391(e) should be limited to mandamus, it certainly would have said so.

Section 1391(e) carefully defines the conduct for which it provides relief as acts of a federal official "in his official capacity or under color of legal authority." (emphasis supplied). Congress was aware of the use of the latter phrase by this Court

as referring to the "misuse of power ... made possible only because the wrongdoer is clothed with the authority" of government. Classic v. United States, 313 U.S. 299 (1941). Indeed, a Deputy Attorney General had told the House Committee that damage actions could be brought against a federal official personally "for actions taken ostensibly in the course of his legal duty but which the plaintiff claims are in excess of his official duty."

Both the Court of Appeals for the District of Columbia Circuit in this case, and the First Circuit in Driver v. Helms, 577 F. 2d 147 (1978), cert. granted sub nom. Colby v. Driver, No. 78-303 (January 15, 1979), focused upon the use of the language "under color of law" as signifying a clear intent by Congress to include damage actions against federal officials in their individual capacities.

Additionally, in 1976, Congress amended §1391(e) so that it includes cases where private individuals are parties defendant in addition to federal officials. As the First Circuit explained in Driver v. Helms, supra, it would make very little sense to join someone who is not an official if the suit were limited to an action in the nature of mandamus.

This Court's decision in Schlanger v. Seamans, 401 U.S. 487 (1971) has no bearing on this case. Schlanger was a habeas corpus case where venue is controlled by specific statutory provisions which are operative under the caveat of §1391(e) "except as otherwise provided by law."

2. The legislative history completely supports the plain language of the statute. A review of that history shows that the Congress was very much aware of the issue of damage actions against federal

officials; that the Department of Justice repeatedly sought to dissuade Congress from including such actions within its new venue provisions; that Congress repeatedly rejected the requests of the Department on this score; and finally, shortly after the enactment of the statute, the Department of Justice acknowledged that the statute encompassed damage actions against federal officials personally -- exactly of the type here at issue.

In 1960, when the bill was first introduced, the Committee received an exposition from Deputy Attorney General Lawrence Walsh in which he explained the various kinds of actions against federal employees, including those in which damages are sought personally from the official "for actions taken ostensibly in the course of his official duty but

which the plaintiff claims are in excess of his official capacity."

At the time of the foregoing exposition, the bill concerned only acts taken in "an official capacity." At Hearings of the House Judiciary Subcommittee on the bill, a representative of the Department of Justice appeared and argued that such actions against officials personally should not be included. When it appeared that some members of the Committee were in fact interested in covering such actions and that consideration was being given to adding the language "under color of law," he specifically warned that such language would be interpreted to include personal damage actions against federal officials.

Following these Hearings, the Committee, despite the request of the Department of Justice, did add the language

"under color of legal authority." The Committee Report makes clear that the specific reason for that change was to meet the venue problem which "arises in an action against a government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty."

The bill was not enacted in 1960 but came up again in 1961. Early in 1962, then Deputy Attorney General White again recommended to Congress that it eliminate provisions which would permit suits for damages personally against government officials. Again the Congress refused to accept the advice of the Department of Justice.

Finally, three months after the Congress passed the bill, the Department

of Justice, in a memorandum distributed to all United States Attorneys, confirmed that the statute did in fact include damage actions of the type here involved.

The argument of the petitioners and the government, that Congress could not have intended §1391(e) to include damage actions because such actions were not then possible, is inconsistent with the advice that the Department was then giving to Congress. It is also an erroneous statement of the law. Personal damage actions against federal employees were possible and were being brought at the time the law was enacted.

The argument of the petitioners and the government that §1391(e) was intended to cover only mandamus actions or actions "in essence against the United States" would require the ignoring of the specific language of the Committee Report

which makes clear a Congressional intent to include damage actions. Neither the government nor the petitioners have any explanation for that language other than to say it is "odd," "enigmatic" or "isolated." In fact, the language is unmistakable and reflects a determination by Congress to reject repeated efforts by the Department of Justice to exclude damage actions against federal officials personally.

Both the Court of Appeals for the District of Columbia Circuit in this case, and that of the First Circuit in Driver v. Helms, supra, closely analyzed the legislative history in this case and confirmed that Congress did intend to include within §1391(e) damage actions of the type here involved.

3. Section 1391(e) not only provides for venue but also for service of pro-

cess by certified mail and the acquisition by the court of personal jurisdiction in that manner. Congress provided for service by mail for the specific purpose of implementing the broadened venue provisions of the bill. The provisions of the bill for service by mail were discussed by Judge Maris during the Hearings before the House Judiciary Committee. He made clear his view that such service would effect personal jurisdiction. The Congress intended that it should.

4. The application of §1391(e) to petitioners does not violate their constitutional rights. Cases dealing with limitations upon the exercise of jurisdiction by state courts can have no application to federal courts where jurisdiction has long been recognized as nationwide subject only to such limitations as the Congress may prescribe.

Even if "traditional notions of fair play and substantial justice" would limit the jurisdiction of inferior federal courts, the petitioners in this case can hardly show a denial of due process. There is in fact no burden on the petitioners; they have been and they are being represented either by government counsel or counsel paid by the government, and can hardly claim the financial difficulties of private litigants in obtaining counsel. They have not been burdened by litigating away from their home base; in fact, in almost five years of litigation in this case, petitioners personally have not been required to make a single appearance in court.

This case has been set at the seat of government, the District of Columbia, and the facts in the case did have their ori-

gin in determinations which were made in Washington, D.C. Thus The case is far different from one in which a defendant is dragged off to a jurisdiction having no nexus to the case.

Any question of possible unfairness in the choice of venue is subject to correction by the recognized discretionary power of the district court to shift jurisdiction "in the interest of justice." 28 U.S.C. §1404(a).

All the arguments of petitioners about fairness ignore completely fairness to the respondents. The petitioners are seeking to force respondents to pursue their litigation in two separate suits or to compel respondents to bring the entire litigation in a community where petitioners have substantial local influence.

Congress specifically intended that the plaintiffs in a case such as the instant one should have the choice of forum and in this case that choice is being fairly exercised.

ARGUMENT

I.

THE PLAIN LANGUAGE OF 28 U.S.C. §1391(e) ENCOMPASSES THE CAUSE OF ACTION HERE AT ISSUE

28 U.S.C. §1391(e) provides that "a civil action in which a defendant is an officer or employee of the United States ... acting in his official capacity or under color of legal authority may ... be brought in any judicial district in which (1) a defendant in the action resides ... [and] the delivery of the summons and complaint to the officer ... may be made by certified mail beyond the territorial limits of the district in which the action is brought."

The case at bar, according to the allegations in the complaint, fits exactly within the statute.

a) this is "a civil action";

b) petitioners were or are "officer(s) or employee(s) of the United States";

c) at the time of the acts complained of, each was acting in his official capacity but beyond the scope of his authority, thus fitting within "acting in his official capacity or under color of legal authority";

d) this action was brought in a judicial district in which "a defendant resides," since it was brought in Washington, D.C. where defendant Goodwin resides; and

e) "the delivery of the summons and complaint to the officer (petitioners)" was "made by certified mail beyond the territorial limits of the district in which the action is brought" -- the delivery of the summons and complaint was made by certified mail to petitioners in Florida.

Respondents laid their entire suit against all four defendants in the District of Columbia on the basis of 28 U.S.C. §1391(e) which expressly gave them authority to do so. That statute, enacted by Congress in 1962, represented a major effort by the Congress to facilitate suits by private individuals claiming that federal officials violated their rights under color of law. As the Senate and House Reports pointed out, the purpose of the new bill was "to provide readily available inexpensive judicial remedies for the citizen who is aggrieved by the working of government." (Senate Report No. 1992, 87th Cong., 2d Sess., 1962, U.S. Code Cong. and Admin. News at 2786; House Report No. 536, 87th Cong., 1st Sess, 1961, at 3; House Report No. 1936, 86th Cong., 2d Sess, 1960, at 3, hereinafter Senate Report,

House Report No. 536, and House Report No. 1936, respectively).

In this case petitioners are trying to avoid both the plain language of the statute and the intent of the legislature in passing it. Despite the articulated intent of the Congress that plaintiffs should make the choice of forum, petitioners wish to give themselves, the defendants, the option to choose the forum or to force the respondents to proceed by two separate lawsuits to vindicate the same wrong.[10/] The main basis of petition-

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10/ The strategic litigation concerns of the plaintiffs and the defendants are not difficult to discern. It is obvious why petitioners would like to move the entire case to Florida. At least two of the petitioners are persons of considerable standing in Northern Florida. One of them is a United States District Judge. Respondents, of course, want to try the case in a neutral area. Thus, the entire case boils down to whether respondents may exercise their statutory right to choose the forum.

ers' argument is the claim that despite its clear language as including civil actions without qualification, in some way §1391(e) should be read as not including damage actions and as being limited to mandamus type actions.

There is nothing in the language of the statute which limits it to mandamus actions as urged by petitioners. Indeed, in the brief submitted by the government, there is an acknowledgment that if the statute is "read broadly there is no escaping" the conclusion that, as the court below held, 28 U.S.C. §1391(e) does encompass damage actions and creates a "different" rule for federal employees being sued for damages than for other persons.

It is particularly difficult to sustain an argument that §1391(e) is limited

to mandamus actions despite the fact that Congress didn't say so, when it appears that the amendment bringing about §1391(e) was one of two sections of a public law, one of which in fact specifically dealt with mandamus type actions or actions "to compel an officer of the United States to perform his duty" (§1361). Thus, Congress certainly knew how to provide that a particular piece of legislation should be so limited if it intended that result.

Section 1391(e) appears as Section 2 of Public Law 87-784, 76 Stat. 744 which is entitled "Mandamus and Venue Act of 1962" (emphasis supplied). The first portion of the Act dealt with mandamus and its provisions are indeed embodied in 28 U.S.C. §1361 which deals with mandamus type actions. Section 2 of the Act reads as follows:

> Sec. 2 Section 1391 of title 28 of the United States Code is amended by adding at the end thereof the following new subsection.

Then follows the language which we now know as paragraph (e). If one but looks at 28 U.S.C. §1391, it will be noted that it is entitled "Venue generally." Thus Congress was providing a new paragraph dealing with venue regardless of the nature of the cause of action.

It is inconceivable that having specifically dealt with mandamus in Section 1 , Congress meant to limit Section 2 to mandamus type actions when it didn't say so -- and ordered the Section to be placed in a Code section entitled "venue generally."[11/]

11/ We believe that much of the argument that §1391e is limited to mandamus type actions derives
(fn. continued on next page)

We do not contend that §1391(e) excludes mandamus type action. It is plain, however, that the statute does not exclude damage actions. This is clear from the fact that the statute is applicable to circumstances where the official is acting "in his official capacity or under color of legal authority" (emphasis supplied). This statute was enacted within a year after the landmark case of Monroe v. Pape, 365 U.S. 167 (1961) with its extensive discussion of damage action (against

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from the accident that it is part of a statute, another section of which deals with mandamus. At the time of its enactment, it was recognized that the statute was in fact dealing with two separate subjects. Thus, then Deputy Attorney General White, writing to the Senate Judiciary Committee about the bill before its enactment, made separate comments about the two sections. After commenting about Section 1, dealing with mandamus type actions, he introduces his discussion of Section 2 as follows: "The venue provision in Section 2 covers an entirely different subject." (See Appendix, infra at 9a)

state officials) for conduct "under color of legal authority." Plainly therefore, the statute does not encompass only mandamus actions in circumstances where an official was acting within the scope of his official capacity and for which the remedy by way of either mandamus or damages may be appropriate. It also covers suits in circumstances where the official was acting "under color of legal authority," i.e. "oestensibly in the course of his official duty but which the plaintiff claims are in excess of the official authority," as outlined by then Deputy Attorney General Walsh,[12/] for which suits

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12/ The breakdown of different types of actions presented to the House Committee by Deputy Attorney General Lawrence E. Walsh when he analyzed the 1960 bill illuminates the language employed by the Committee. The Deputy Attorney General said:

> Most actions are brought against a

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> public official (or Government agency either (1) to enjoin him from taking action asserted to be beyond his official authority and in violation of some legal rights of the plaintiff or (2) to seek damages from him personally for actions taken ostensibly in the course of his official duty but which the plaintiff claims are in excess of his official authority. It is a basic legal concept that both of these types of actions are against the official in his individual capacity.
>
> The only type of suit which might be brought against Government officials (or agency) in his official capacity would be the equivalent of a writ of mandamus or mandatory injunction which would compel the official to perform his duty. The Supreme Court has repeatedly upheld decisions that authority to issue a writ of mandamus to an officer of the United States commanding him to perform a specific act, required by law of the United States, rests solely with the U.S. District Court for the District of Columbia. H.R. 10059 relates only to venue and this bill would not confer mandamus jurisdiction on courts other than the district court for the District of Columbia. (emphasis supplied)

Mr. Walsh's entire letter is printed in the appendix to the brief infra at 1a. It was also

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for damages or for prohibitory injunctive relief are precisely appropriate and mandamus inappropriate.

The phrase "under color of legal authority" employed by the Congress in respect to this statute was in the context of the meaning of comparable language in the Civil Rights Acts as established by this court. In Classic v. United States, 313 U.S. 299 (1941) the defendants contended that "under color of law" should be interpreted to mean only official acts. The Court totally rejected that interpre-

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printed in House Report No. 1936 at 5-6.

In Point II, infra, we show that the use of language "under color of legal authority" was in specific response to elucidation from Mr. Walsh and the explanation by a Department of Justice Attorney at the Hearings that the use of that language would cover suits where damage was being sought from the federal official because he acted outside of his legal authority.

tation stating that action taken "under color of law" is "[m]isuse of power ... made possible only because the wrongdoer is clothed with the authority of state law." Id. at 326.

This Court further clarified the definition in Screws v. United States, 325 U.S. 91, 111 (1945), a prosecution under 18 U.S.C. §242:

> It is clear that under 'color' of law means under 'pretense' of law. ... Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the state in fact authorized, the words 'under color of any law' were hardly apt words to express the idea. (emphasis supplied)

Accord, Williams v. United States, 341 U.S. 97, 99 (1951).

The meaning of "under color of law" having been made clear by this Court in

Classic, supra, and its progeny, the definition was known to Congress when it passed §1391(e). Given the settled definition of "under color of legal authority," its use in §1391(e) was clearly designed to include ultra vires activities and that was in specific response to the analysis made by Deputy Attorney General Walsh before the House Hearings and the testimony of Justice Department Attorney MacGuineas who appeared for the Department of Justice at the House Committee Hearings.

Petitioners claim that "under color of legal authority" was included in the statute only to avoid the sovereign immunity issue but not to cover damage actions. (Pet. Br. at 6-7, 17-18). But as this Court said in Screws, supra at 111, if the language was only intended to

cover authorized actions the "'under color of ... law [language was] hardly apt."

If the official is acting merely "under color of law," the one kind of action that would appear to be inappropriate is mandamus. For by definition mandamus involves an effort to compel an official to perform as he is duty bound to do. Where, however, an official acts merely under pretense of law -- the character of the relief sought is that which is available against any private citizen whether it be damages, declaratory relief, or injunction. The argument that the statute is limited to mandamus actions therefore has no foundation.

Congress clearly had all the foregoing in mind when it used the disjunctive language "in his official capacity or under color of legal authority" (emphasis

supplied). Both the court below, and the First Circuit in Driver v. Helms, 577 F. 2d 147 (1978) cert. granted, sub nom. Colby v. Driver, No. 78-303 (January 15, 1979), confirmed that the clear language of the statute covers damage actions. After quoting §1391(e) and discussing it, the Court of Appeals in this case said: "The suit thus fits within the ostensible coverage of §1391(e)" (Pet. App. at 5a). The court continued:

> The conscious addition by Congress of language designed to extend Section 1391(e) to suits for damages against federal officials acting under color of legal authority, coupled with its adherence to that language despite highly respectable protest, manifests beyond peradventure an intent to broaden venue in just such suits. Our duty is to harken to the will of Congress as expressed, and the statutory mandate is clear. Id. at 9a, (emphasis supplied).

The First Circuit in Driver v. Helms,

supra, said the "plain language" (Id. at 152) of §1391(e) covers damage actions such as this. The Court said:

> we must interpret the United States Code as it is written. Congress did not limit the application of §1391(e) to "[actions] in the nature of mandamus." Rather Congress used the words '[a] civil action in which each defendant is an officer or employee of the United States ... acting ... under color of legal authority.' the statute does not, by its term, limit the kind of civil action to which it applies. The case at bar is a civil action. The complaint alleges that the defendant officers of the United States were acting 'under color of legal authority'. All elements fit and we deal with a statute speaking in a highly technical field, venue and jurisdiction, where, if anywhere, precision is required.
>
> The plain language of §1391(e) covers this case, but again we would go beyond the plain language if the result were absurd or plainly at variance with congressional policies. We conclude, after considering such questions, as have many other courts, that §1391(e) should cover damage actions against officers in their individual capacities. Id. at 151-152 (footnotes omitted).

This analysis is confirmed by a 1976 amendment of the statute adding the following:

> Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

Congress thus made clear that it wanted §1391(e) applicable in cases where there were non-federal officials as defendants. To make §1391(e) clearly applicable to such cases, Congress changed the wording of §1391(e) from "a civil action in which each defendant is an officer or employee of the United States" to "a civil action in which a defendant is an officer or employee of the United States." (emphasis supplied).

The First Circuit found persuasive the fact that Congress amended §1391(e)

in 1976 for this showed that Congress understood that §1391(e) reaches personal damages actions. Driver v. Helms, supra at 154. In discussing the amendment, the court said:

> It would make little sense to join someone who is not an officer if the suit were limited to an action in the nature of mandamus. Therefore, the suit Congress was contemplating must be aimed at acts that can give rise to liability for private remedies. Ibid.

If §1391(e) is to be further amended so as not to encompass damage actions such as the instant case, Congress and not this Court is the proper body to make the change. Until and unless Congress does, this Court should interpret §1391(e) as Congress has passed it and as Congress has thus far amended it.[13/]

13/ Private counsel argue that the use of the
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Petitioners recognized that this Court's discussion of §1391(e) in Schlanger v. Seamans, 401 U.S. 487, 490 n.4 (1971) has little relevance to this case and

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present tense "is" and "acting" means that the statute is limited to "present, ongoing official conduct" (Pet. Br. at 14). It seems absurd to suggest that Congress would have made the venue of a suit depend on a race to the courthouse and whether the plaintiff arrives there before the official terminated his violation of the citizen's rights. An injured private citizen may have to sue in damages for past conduct, declaratory judgment relief for present or past conduct, injunctive relief to prevent conduct, or mandamus to compel conduct. The notion that Congress would have venue affected by the choice of remedies and whether the act were continuing, terminated, or terminated but likely to be resumed, and to base all of that on the supposed tense of the language employed is impossible to accept.

It is plain that the present tense describes "the defendant's official capacity at the time of the acts complained of, rather than his capacity at the time suit was filed." Govt. Br. at 13 n.9.

dealt with Schlanger in a footnote. (Pet. Br. at 11 n.3). This Court in Schlanger, supra at 490 n.4 said that §1391(e) is not applicable to habeas corpus proceedings. The government's reliance on the Schlanger case to ask for a restrictive reading of §1391(e) is misplaced. (Govt. Br. at 14). This Court noted in the Schlanger footnote referred to above that although in §1391(e) Congress provided for nationwide service of process in normal civil actions in which the defendants are officers or employees of the United States, "the legislative history of that section is barren of any indication that Congress extended habeas corpus jurisdiction." Schlanger, supra at 990 n.4. This Court has recognized that "essentially the habeas proceeding is unique. Habeas corpus practice has con-

formed with civil practice only in the general sense." Harris v. Nelson, 394 U.S. 286, 294 (1969). Whereas venue in civil actions is normally controlled by the various provisions of 28 U.S.C. §1391, venue in habeas corpus actions is controlled by the specific statutes governing habeas corpus (28 U.S.C. 2241, 2255).[14/]

14/ For example, under the provisions of §1391(a), a diversity action may be brought in a district where all the plaintiffs reside, or all the defendants reside, or the cause of action arose. By contrast, in a habeas corpus action, the district courts may issue writs only "within their respective jurisdictions," 28 U.S.C. §2241. That phrase has been interpreted to mean the district where the prisoner is in custody, when the prisoner and custodian, whose authority is challenged, are in the same district. When, however, the prisoner is in custody in one state, Alabama, and is challenging a detainer of another state, Kentucky, unlike in a diversity action, the latter would be the appropriate venue because the writ would be issuing against a Kentucky official. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973). The matter is resolved not by turning to provisions of §1391, but by interpreting the habeas corpus statute, 28 U.S.C. §2241, itself.

Habeas corpus, then, is one of those situations expressly exempted from §1391(e) under the statute's caveat, "except as otherwise provided by law."

Thus, it is not merely that "the legislative history of [§1391(e)] is barren of any indication" that Congress intended to apply §1391(e) to habeas corpus jurisdiction, Schlanger, v. Seamans, supra at 490 n.4, but the fact that both the face of the habeas corpus statute and the actual nature of the habeas corpus remedy make it clear that habeas corpus does not fall within 1391(e).

Unlike habeas proceedings, respondents' suit against petitioners is a civil action clearly covered by the language of §1391(e). Therefore, this Court's ruling in Schlanger has no bearing on the question raised herein, i.e., the applicability of §1391(e) to damage action suits.

II

THE LEGISLATIVE HISTORY OF §1391(e) SUPPORTS ITS APPLICATION TO DAMAGE ACTIONS AGAINST FEDERAL OFFICIALS FOR ACTS UNDER COLOR OF LEGAL AUTHORITY

One of the cardinal rules of statutory construction is that when provisions of a statute "are clear and unequivocal on their face, [there is] no need to resort to the legislative history of the Act." United States v. Oregon, 366 U.S. 643, 648 (1961). See also Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976); Banks v. Chicago Grain Trimmers Ass'n., Inc., 390 U.S. 459, 465 (1968); Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485, 492 (1947); and Lewis v. United States, 92 U.S. 618, 621 (1875).

We believe that the language of the statute is so clear that there is no need

for this Court to examine the legislative history of §1391(e) in order to affirm the judgment of the court below.

Both the government and petitioners, however, by reading the legislative history in a selective and distorted manner,[15/]

15/ As we explain above (P.36 n. 11) one of the reasons the government and petitioners have been able to confuse the legislative history is because Congress was achieving two legislative objectives in one bill. (1) It amended the statute about mandamus type actions (28 U.S.C. 1361); and (2) it amended the venue statute (28 U.S.C. 1391(e)).

In our statement of the statutes involved, we have set forth the public law as it was enacted. A glance at the public law, as enacted, makes it clear that the statute did in fact involve separate objectives.

As will be hereinafter shown, references in the legislative history, clearly applicable only to what became §1361, are inapplicable to §1391(e).

argue that Congress, regardless of the language it used in §1391(e), did not intend the statute to cover damage actions. Respondents will show that, in fact, the legislative history merely confirms what we have demonstrated to be the clear meaning of the statute: that Congress was thoroughly aware of the damage action issue, deliberately chose language to express its intention to include damage actions within the bill, and, despite a specific request by the Department of Justice that it act to exclude such actions by modifying the language it was employing as the bill was progressing through Congress, declined to do so when the bill was finally enacted. We will further show that promptly after the enactment of the statute, the Department of Justice acknowledged its own understanding that Congress had in fact

included damage actions within §1391(e).

Thus, while we believe a review of legislative history is entirely unnecessary to sustain the plain language of the statute as outlined above, it is in fact clear that such a review overwhelmingly establishes that Congress intended to achieve exactly what the statute provides.

The one major point that emerges from that review is the fact that the Department of Justice at every stage of the bill's development, urged Congress not to use language that included damage actions. It also shows that Congress repeatedly rejected such proposals and suggestions which would have precluded damage actions.

We will address the legislative history in the following four phases of the development of the statute:

a) The House Committee consideration of the proposed legislation;

b) the House Committee Report and the redrafted bill show the Committee's reaction to the Department of Justice proposals;

c) the reaction of Congress to subsequent proposals from the Department of Justice; and

d) the Department of Justice's contemporaneous recognition of the impact of the statute.

A. The House Committee Consideration of the Proposed Legislation in 1960

In 1960 the House Committee on the Judiciary held Hearings on H.R. 10089,[16/]

16/ The bill provided for the amendment of 28 U.S.C. §1391 by adding the following paragraph:

> (e) A civil action in which each defendant is an officer of the United States in his official capacity, a person acting under him,

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86th Cong., 2d Session (1960) [House of Representatives, Hearings before the Committee of the Judiciary Subcommittee No. 4, (May 26 and June 2, 1960)(hereinafter "Hearings")[17/].

At the request of that Committee, prior to the Hearings, then Deputy Attorney General Lawrence E. Walsh wrote to the Committee about H.R. 10089, saying the bill in its proposed form would have no real effect because (1) it did not cover damage actions against federal

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> or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides.

Additional provisions related to the service of process. There was nothing in this bill which articulated a reference to "mandamus type actions." An identical bill had been introduced in 1958, but no action was taken on it. H.R. 10892, 85th Cong., 2d Sess. (1958).

17/ The transcripts of these Hearings are unpublished. The government lodged a certified copy with the Clerk of this Court.

officials for their acts outside the scope of their authority, and (2) that while it created venue outside the District of Columbia, it did not give subject matter jurisdiction to district courts outside the District of Columbia for mandamus actions (infra,Appendix A at 32-4a). This statement, which the House Committee had before it during the Hearings, a very early stage of the legislative history, shows that the Justice Department,and in turn the Committee,were fully aware of the problem of damage suits against a federal "official in his individual capacity" for acts done in connection with the official's employment but beyond the scope of the official's authority. The court below gave a similar analysis of Deputy Attorney General Walsh's letter (Pet. App. at 6a-7a). The court in Driver v. Helms, supra at 153, noted that

the Department of Justice had expressed reservations about the utility of the proposed bill because:

> Most actions against government officials, such as those seeking personal damages for acts in excess of official authority would not be covered by a bill limited to "official capacity."

Following the Committee's receipt of Deputy Attorney General Walsh's letter, Donald B. MacGuineas, Chief, General Litigation Section, Civil Division, Department of Justice, testified on both days of the Hearings for the Department of Justice. At the Hearings, he stated, "I think the committee ought to bear in mind, it apparently has assumed that this bill was intended to cover only a mandamus action." (Hearings at 31-32). Congressman Poff responded with an unequivocal "No" (Id. at 32). Committee Counsel Drabkin added

his understanding[18] (Ibid). Congressman Dowdy said, "I asked to be sure it was not limited to that. That was my purpose." (Ibid).

Justice Department Attorney MacGuineas pressed Congress not to include damage actions against government officials in their personal capacity. He warned against adoption of language which encompasses actions taken "under color of legal authority" (as some were proposing be done) saying:

> Such a bill, it seems to me, is likely to be interpreted by the courts as intending to cover the

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18/ The court below did not have access to the transcript of the Hearings which has never been printed or published. When the government obtained access to the typed copy of the Hearings transcript, it filed a copy with the First Circuit a few days before the argument in Driver v. Helms, supra. That was almost six months after the circuit decision in this case and three months after the government's petition for rehearing was denied by the court below.

> case where the citizen sues the Government official or the judge or the Congressman because he made a statement under color of his official duty." Hearings at 62.

Committee Counsel Drabkin responded: "What is wrong with that?" (Ibid). While further colloquy indicated that at the Hearings, Justice Department Attorney MacGuineas may have persuaded some members of the Committee, it is evident from the Report of the Committee and its redrafted bill that upon subsequent consideration the Committee decided not to heed the Justice Department Attorney's warning.

As we will show below, the bill that came out of the Committee specifically and deliberately added the phrase "under color of legal authority" to achieve precisely what Deputy Attorney General Walsh had outlined and what Justice Department Attorney MacGuineas had urged should not be done.

B. The House Committee Report and the Redrafted Bill Show the Committee's Reaction to the Department of Justice Proposals.

The bill that came out of the Committee, H.R. 12622, was considerably changed from H.R. 10089. We have set forth the relevant portion of the bill to graphically show the changes:

> (e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity, or under color of legal authority, [a person acting under him], or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides, or in which the cause of action arose, or in which any property involved in the action is situated.19/

19/ Matter added is underlined and matter deleted (not here relevant) is bracketed.

The purpose of the language changes[20/] is unmistakeable when read against Deputy Attorney General Walsh's letter and Justice Department Attorney MacGuineas' testimony. But the Committee's Report (H.R. Report No. 1936), goes further, it leaves nothing to supposition, stating:

> The Department of Justice took the position that H.R. 10089 would not accomplish the purpose for which it would appear to have been designed and the Department did not recommend enactment of that bill. As a result of the Department's comments and of hearings which were held on H.R. 10089, a new bill, H.R. 12622, was drawn which the committee believes remedies the defects pointed out by the Department of Justice. The Department has not taken an official position on the new bill although requested to do so at the hearings. House Report No. 1936 at 4.

20/ The redratted bill also required that the official being sued be served with the summons and complaint. The previous bill had allowed for service of process on the United States Attorney in the district where an action was brought. The significance of this change is obvious. A suit could not be maintained for damages from an official's pocket without providing for notice to the official being sued.

Earlier in the same report, the Committee said:

> The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty. Id. at 3.

Even without the benefit of the transcript of the House Committee Hearings, the Court of Appeals in this case recognized from the House Committee Report that Congress deliberately intended to include damage actions under the bill. The court said:

> Since H.R. 10089 would have conferred no mandamus jurisdiction and would not have applied to actions against officials "individually," the Department doubted whether its enactment "would serve any useful purpose."
>
> H.R. 12622 was drafted to meet these and other criticisms. Its first section extended mandamus jurisdiction to all of the federal district courts. Its second section broadened the prior venue proposal to include suits directed

> at a federal official's activity whether characterized as occurring "in his official capacity" or "under color of legal authority." The purpose of the new bill was "to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government, but who would previously have been compelled to sue in the District of Columbia by the pre-existing venue provisions, which were deemed "contrary to the sound and equitable administration of justice." And the House Report specifically noted that "[t]he venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." Pet. App. at 7a-8a (footnotes omitted).

When it wrote its opinion in Driver v. Helms, supra, the Court of Appeals for the First Circuit had access to the Hearings, hence its exposition of the developing Congressional intent is more complete. It said:

> The hearings on the bill before a subcommittee of the Committee on

the Judiciary demonstrate that at least some members of that subcommittee did not want the bill limited to a narrow purpose. For instance, at one point Mr. Drabkin, the subcommittee's counsel, stated, "I think what this bill is concerned with doing is dealing with mandamus and also dealing with petitions for review which may not properly be brought now because of some venue defect." Congressman Dowdy responded, however, "I asked to be sure it was not limited to that." Id. at 32.

Later in the same hearing Mr. MacGuineas, a representative from the Department of Justice, said he did not understand what the bill was trying to do. "In order to understand that we would have to know how this bill is intended to affect each particular type of suit that a citizen may want to bring against a Government official, and there are many different types." Congressman Dowdy responded, "Maybe we want it to apply to all suits. There is not any particular one. We want it to apply to any one." Congressman Whitener followed that up by saying, "I did not understand there was any doubt." Id. at 53-54. One type of suit hypothesized by Mr. MacGuineas was a slander suit against a congressman. Congressman Whitener indicated that he felt the bill should cover such a situation. Hearings, supra at 55,

> and he compared it to a postal worker slapping a housewife as he delivered mail. Id. at 58 Driver v. Helms, supra at 152-153 (footnotes omitted).

As to the "under color of legal authority" language the court said:

> The desire to reach a variety of causes of action prompted the first mention of the "under color of legal authority" phrase. After a discussion whether certain kinds of acts would constitute official action or not, Mr. Drabkin proposed, "Suppose in order to take care of a body of law which seems to say that when a government official does something wrong he is acting in his individual capacity, we added the following language -- 'acting in his official capacity or under color of legal authority.' That would not bring in the type of situation in which a postman, after he had gone home for the night, proceeded to run over somebody's child." Id. at 61-62. This is the first appearance of the "under color" language, and its context suggests that it was understood to exclude only those personal damage actions arising from purely private wrongs. Id. at 153 (footnotes omitted).

It is thus indisputable that the House Committee, in its draftsmanship of

the bill and in its Report, could not have been clearer in stating its intention of including damage actions against government officials acting under color of legal authority but beyond the scope of their authority.

C. The Reaction of Congress to Subsequent Proposals from the Department of Justice.

The bill, which had passed the House in 1960, was reintroduced and referred to the Senate.[21] The Senate Judiciary Committee asked for comments on it. Then Deputy Attorney General Byron R. White

21/ Although H.R. 12622 was passed in the House in 1960, the Senate adjourned without acting on it. The House Judiciary Committee republished its previous report on H.R. 12622 as House Report No. 536, to accompany the bill which was reintroduced as H.R. 1960. Some changes were made from the previous report including the omission of Deputy Attorney General Walsh's letter.

responded on behalf of the Department of Justice.[22] Once again the Department of Justice questioned the wisdom of the proposed legislation. Deputy Attorney General White's letter criticized the bill and made proposals as to each of the two sections of the bill.

First, as to the mandamus part (Section 1 of the companion bills H.R. 1960 and S. 20)[23], the Department of Justice (1) questioned the wisdom of allowing district courts outside of the District of Columbia to mandamus cabinet officers; and (2) felt it essential that the language of that

22/ Deputy Attorney General White's letter to Senator Eastland as Chairman of the Committee on the Judiciary was contained in Senate Report. The letter is printed in the Appendix to this brief, as Appendix B, infra at 6a.

23/ Because S. 20 was identical with H.R. 1960 and is not referred to by that number in either the petitioners' or government's brief, we will use H.R. 1960 for the penultimate version of the bill.

section be changed so that the mandamus power be limited "to ministerial duties owed the plaintiff." Senate Report at 2788, infra at 8a-9a.

As to Section 2, the venue provision, the Department of Justice again sought to eliminate its coverage of damage actions by suggesting that this portion of the bill be tied "directly to the Administrative Procedure Act" which "unquestionably eliminates suits for money judgments against officers...." Senate Report at 2789, infra at 10a-11a. The next recommendation was that the provision for venue in any judicial district wherein a plaintiff resides be changed to grant venue in any judicial district "'in which the cause of action arose or in which any property involved in the action is situated.'" Senate Report at 2789, infra at 11a. The Department of Justice

letter set forth the alternative language proposed for the bill. As to §1391(e) it suggested the following language:

> "(e) Except where a special statutory proceeding for judicial review relevant to the subject matter is provided in any court specified by statute, a civil action for judicial review of agency action under section 10 of the Administrative Procedure Act (60 Stat. 243, §10; 5 U.S.C. §1009) may be brought in any judicial district as above provided or in any judicial district in which the cause of action arose, or in which any property involved in the action is situated.
> "The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that delivery of the summons and complaint to the officer as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought." Senate Report at 2789-90, infra at 14a-15a.

The Department of Justice also recommended that an additional section be added to the bill to avoid misunderstanding in connection with the tax law. Senate Report at 2790, infra at 15a.

Some of the Department of Justice's proposals were adopted by Congress; another, specifically that having to do with the elimination of damage actions, was not. The mandamus section of the bill was changed from "his duty" to "a duty owed to the plaintiff or to make a decision in any matter involving the exercise of discretion." 108 Cong. Rec. 20093 (1962)(House), 108 Cong. Rec. 18782 (1962) (Senate).

At the time it reached the floor of Congress, with respect to the issue of the inclusion of damage actions, Section 2 of H.R. 1960 was in exactly the same language as that which emerged from the House Committee in 1960. It provided in pertinent part:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal

> authority, or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides, or in which the cause of action arose, or in which any property involved in the action is situated.

In the course of its consideration of the bill, Congress did not eliminate venue at the plaintiff's place of residence, as the Department of Justice had suggested. Congress instead qualified the statute by adding, as the precondition to laying venue in the place of plaintiff's residence, "if no real property is involved in the action." Congress also added a provision to allow suits where "a defendant in the action resides." The first part of Section 2 of H.R. 1960 was thus amended to read as follows:

> (e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the

> United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action."
> (House) 108 Cong. Rec. 20093 (1962), (Senate) 108 Cong. Rec. 18783 (1962).

Congressman Forrester, who was Chairman of the subcommittee of the House Judiciary Committee that had studied the bill, explained on the floor of the House that the Senate had amended the House version and that, "The Senate amendments clarify in that they specifically provide for venue where a defendant in the action resides." (108 Cong. Record at 20094). He further explained how §1391(e) would supplement §1391(b), so that suit could be brought "wherever a defendant in the action resides." Ibid. (emphasis supplied). He also said that the venue

provisions "should apply only to the extent that venue is not otherwise provided by law." Ibid. Congressman Forrester did not include in his list of what should not be encompassed within the bill damage actions against federal officials.[24/] It thus becomes clear that the Senate Committee and the Senate and in turn the House had given careful consideration to Deputy Attorney General White's recommendations, adopted some and rejected others. They did not adopt the proposal that would have eliminated damage actions. The government argues now that this was "regrettable." (Govt. Br. at 45).

On September 20, 1962, the House and

24/ Congressman Forrester included as examples of actions not covered proceedings brought with respect to federal taxes, certain immigration proceedings, and actions against the TVA. (Ibid). Congress thus dealt with Deputy Attorney General White's concern about how the bill would be interpreted in respect to federal tax proceedings.

the Senate both passed H.R. 1960. As amended by the Senate and in turn by the House, Section 2 of H.R. 1960 became §1391(e).[25] As to the purposes of the new law, it is significant that immediately after the bill was passed, Senator Mansfield asked and received permission to print an excerpt from the Senate Report No. 1992 "explaining the purposes of the bill." 108 Cong. Record 18783 (1962) (emphasis supplied). Senator Mansfield's excerpt contained the following:

> The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which are taken by the official in the course of performing his duty.[26] Ibid. (emphasis supplied).

25/ Both petitioners and the government argue that the bill had a single purpose -- that relating to mandamus type proceedings.

26/ This same paragraph was included in both House Reports and in the Senate Report.

It should be noted that Senator Mansfield used the plural "purposes," which makes it clear that he thought the bill had more than one purpose. Also, the paragraph he quoted speaks in terms of "seeking damages from him," i.e. from the government official whom it is claimed acted "without legal authority." It is self-evident that action "without legal authority" cannot be encompassed within a mandamus type action, which is defined as an action to compel the performance of "a duty owed to the plaintiff." 28 U.S.C. §1361.

The First Circuit in Driver v. Helms, supra, after discussing the mandamus purpose of the legislation, said:

> Even if we were to acknowledge that the primary purpose of §1391(e) was to expand venue in mandamus cases, that would not preclude it from serving other purposes as well. That it does do so and was intended to do so is indicated by the legislative history described above. Id. at 154.

The court below quite properly found significance in the fact that Congress did not adopt the Department of Justice's suggestion to eliminate damage actions from the coverage of the bill.

> The House passed H.R. 12622 but the Senate adjourned before any action was taken on it. So, in the next Congress, it was reintroduced as H.R. 1960, comments were again solicited, and again the Department of Justice asked that portions of the bill be "clarified." Some proffered clarifications were adopted, but notably the Department's suggestion that the venue provision be changed to "eliminate[] suits for money judgments against officers was not. Rather, both the House and Senate committees rejoined with the observation that the "venue problem" which the bill sought to rectify was as troublesome in damage suits against officials as in other sorts of civil litigation.
>
> This colloquy between the Department of Justice and the legislative draftsmen demonstrates the legislature's comprehension and resolution of the issue before us. The conscious addition by Congress of language designed to extend Section 1391(e) to suits for damages against

> federal officials acting under color of legal authority, coupled with its adherence to that language despite highly respectable protest, manifests beyond peradventure an intent to broaden venue in just such suits. Our duty is to harken to the will of Congress as expressed, and the statutory mandate is clear. Pet. App. at 8a-9a (footnotes omitted).

Similarly, in Driver v. Helms, supra, the First Circuit recognized the significance of Congress' rejection of Deputy Attorney General White's proposal for eliminating damage actions. The court said:

> The letter recognized that section 2 of the bill, the new §1391(e) "covers an entirely different subject" than section 1, the new 28 U.S.C. §1361, and that unless clarified §1391(e) might apply to "suits for money judgments against officers." S.Rep. No. 1992, 87th Cong., 2d Sess. (1962), 1962 U.S. Code Cong. & Admin. News, pp. 2784, 2879 [hereinafter cited as Senate Report]. Though acting on other suggestions from that letter, Congress did nothing to eliminate personal damage actions. In fact, both the House and Senate reports

state, "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." House Report, supra, at 3; Senate Report, supra, 1962 U.S. Code Cong. & Admin. News at 2786 (emphasis added).
Id. at 153-154 (footnotes omitted, emphasis court's).

D. The Department of Justice's Contemporaneous Recognition of the Impact of the Statute.

Some three months after the President signed the bill and it became law, then Deputy Attorney General Nicholas deB. Katzenbach wrote a memorandum dated January 18, 1963 to all United States attorneys in which he acknowledged that §1391(e) is applicable to damage actions

against government officials.[27/]

Deputy Attorney General Katzenbach wrote:

> B. The venue provision is applicable to suits against Government officials and agencies for injunctions and damages as well as suits for mandatory relief. By including in the venue provision the phrase "or under color of legal authority," the statute makes the expanded venue applicable not merely to actions for mandatory relief but also to actions in which the defendant Government official is alleged to have taken or is threatening to take action beyond the scope of his legal authority although purporting to act in his official capacity. Katzenbach Memorandum at 7, infra at 17a (emphasis in original, footnotes omitted).

27/ The relevant portions of Deputy Attorney General Katzenbach's memorandum are printed in the Appendix to this brief (infra at 16a-21a). The entire memorandum is among the documents the government lodged with the Clerk of this Court. The government (then representing petitioners) also lodged the memorandum with the court below pursuant to a motion to lodge which was granted (Pet. App. at 29a). The government at the same time had moved for rehearing with the suggestion for rehearing en banc. As the court below did not have the memorandum before it when it was considering this case, the importance of the memorandum and of the government's acknowledgment that damage actions are covered is not reflected in the opinion of the court below.

The case at bar is exactly the type of action which Deputy Attorney General Katzenbach says is covered.[28/] Deputy Attorney General Katzenbach's further discussion shows that the Department of Justice realized that Reports from both Houses of Congress said that the bill would cover damage actions against federal officials for actions taken by officials in the course of performing their duty but beyond the scope of their authority; that Congress meant to cover damage actions. The memorandum states:

> 9/ The House Report, pp. 3,4, states: "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of

28/ He cites Barr v. Mateo, 360 U.S. 564 (1959) and Howard v. Lyons, 360 U.S. 593 (1959) showing the Justice Department's continuing concern about libel and slander damage actions against federal officials.

> performing his duty . . . By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen."
> Katzenbach Memorandum at 7 n.9, infra at 17a-18a n.9.

The Memorandum also stated:

> This statute has no application to a suit brought against a Government official with respect to an act in the performance of which he purported to act as a private individual, not as an official. The Department does not, of course, represent Government officials in such cases.
> Katzenbach Memorandum at 7, infra at 18a-19a.29/

29/ This statement helps rebut the confusing way in which petitioners' and government's briefs attempted to persuade the Court that this case is not covered because petitioners are being sued individually. Petitioners are being sued both in

(fn. continued on next page)

Because the memorandum totally supports respondents' position, the government now claims that Deputy Attorney General Katzenbach's statements in the memorandum are "wrong." (Govt. Br. at 49 n.34).

Thus, we submit, the legislative history of this bill during two years of its reconsideration by Congress absolutely confirms the plain meaning of the language of the statute.

We now deal with the arguments made by the government and the petitioners in their attempt to answer the clear impact of both the language of the statute and

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(fn. continued from preceding page)

their individual and in their official capacities but only for acts taken under color of legal authority. They were not being sued for acts taken as private individuals. If they had been, the government would not have represented them or paid for their attorneys.

the legislative history.

1. The government (Govt. Br. at 14) and the petitioners (Pet. Br. at 11 n.3) argue that this Court's decision in Schlanger v. Seamans, supra, a habeas corpus decision, calls for a restricted interpretation of the meaning of §1391(e) in a damage action. We have answered this supra at 48.

2. The government (Govt. Br. at 16-20) and the petitioners (Pet. Br. at 16) argue that §1391(e) could not have been intended to be applicable to damage actions against federal employees, because, as the government puts it, at the time of the enactment of the statute, "[f]ederal officers were immune from suits arising out of acts taken within the outer limits of their authority." (Govt. Br. at 17). As the petitioner puts it,

"[w]hen Section 1391(e) was enacted, damage suits such as this action brought in essence against federal officials were unknown in the federal courts." (Pet. Br. at 16).

If what the government and the petitioner say were true, what was Deputy Attorney General Walsh talking about in his 1960 letter to the Committee (supra at 57-59)? What was Justice Department Attorney MacGuineas arguing about to the Committee at the Hearings (supra at 59-61)? What were the House and Senate Committees talking about in their Reports when they specifically mentioned damage actions (supra at 64)? Why was Deputy Attorney General White anxious to modify the bill to make sure that it would not include damage actions (supra at 68-71)? And finally, what was Acting Attorney General Katzenbach talking about when he notified

United States Attorneys throughout the country that 28 U.S.C. §1391 was applicable to damage suits against government officials (supra at 80-84)?

The truth is, that as of 1962 and for years prior thereto, federal officials have been subject to suit. Even petitioners admit as much four pages before they assert that such "suits...were unknown." At page 12 of petitioners' brief we read:

> "Federal officers have always been amenable to suit in actions seeking damages for wrongful acts performed under color of law, subject to the ordinary rules governing jurisdiction and venue. Note, Developments in the Law - Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 832 (1957); see Mitchell v. Harmony, 54 U.S. (15 How.) 115 (1852)."

The government, too, admits that such suits were brought. At p. 42 of its brief we read:

> "Such suits were brought throughout the country, and the plaintiffs had only to satisfy conventional rules of jurisdiction and venue." (Govt. Br. at 42).

As of 1962, damage suits against federal officials acting under color of law were well known. While Barr v. Mateo, supra, provided immunity in that case, this Court carefully pointed out:

> "To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions." Barr v. Mateo, supra at 573.

As early as 1804, this Court held that the commander of a U.S. warship was liable in damages for the unauthorized seizure of a Danish vessel. Little v. Barreme, 6 U.S. (2 Cranch) 169 (1804).

Later, in Mitchell v. Harmony, 54 U.S. (15 How.) 115 (1852), this Court upheld a jury award of damages against an

army colonel who had issued an illegal order, and in favor of a citizen who lost property as a result of the illegal order. This Court said that even if the colonel had been following an illegal order of his superior officer it would not justify his conduct. It ruled that the defendant did not stand in the situation of an officer who had merely executed an order, "he advised the order, and volunteered to execute it." Id. at 137.

There are many examples of suits against federal officials. See, e.g., Colpoys v. Gates, 118 F. 2d 16 (D.C. Cir. 1941), (which held that a U.S. Marshal was not immune from suit for defamation); Kozlowski v. Ferrara, 117 F. Supp. 650, 652 (S.D.N.Y. 1954), (liability of an FBI agent for false arrest and malicious prosecution); Buck v. Colbath, 70 U.S. (3 Wall) 334 (1865), (liability of U.S.

Marshal for unauthorized seizure of property); Bates v. Clark, 95 U.S. 204 (1877), (liability of military personnel for illegal seizure of liquor from Indians); and Hughes v. Johnson, 305 F. 2d 67 (9th Cir. 1962), (federal game wardens who carry out unlawful search and seizure not immune from liability).

The fact that in 1962 most damage actions against federal officials in federal courts may have arisen under state law and were based on diversity jurisdiction cannot alter the fact that suits for damages against federal officials in federal courts were possible. The point of the statute was in fact to ease the venue and service requirements in such suits.

In fact, prior to this Court's recognition of constitutional torts in Bivens v. Six Unknown Named Agents, 403 U.S. 388

(1971),[30] diversity actions might have been the area in which §1391(e) would have proved most valuable to plaintiffs. At that time, pursuant to 28 U.S.C. §1332(a), diversity actions could be brought not only in the district where the defendant resided, thus allowing personal jurisdiction by personal service, but also in the district where the plaintiff resided, where personal jurisdiction could not be obtained without some special statutory authorization. The change in §1391(e) therefore enabled plaintiffs to seek redress in their home forum when injured by a federal official located in a different state, and to have a means of effecting

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30/ While Bivens v. Six Unknown Named Agents, supra, clarifying the basis for suits for constitutional torts was not decided until 1971, anyone reading Bell v. Hood, 327 U.S. 678 (1946) had to be aware that there was a distinct possibility that such suits would in time be recognized.

service, rather than be forced to sue in the district where that official resided.

The government suggests that diversity actions have no relevance here because service in those cases is controlled by Rule 4(f) of the Federal Rules of Civil Procedure, which, they claim, places a territorial limit on effective service. See Govt. Br. at 22 n.14. But Rule 4(f), by its terms, goes on to provide for effective service beyond the territorial limits of that state "when a statute of the United States so provides." Fed. R. Civ. P. 4(f). Obviously, 28 U.S.C. §1391(e) is just such a federal statute providing for effective extra-territorial service, and therefore broadening aggrieved plaintiffs' ability to bring damage actions against federal officials, including those based on diversity of citizenship.

3. The government claims that the statute was intended to cover only "suits seeking to compel an officer or employee to perform a duty." (Govt. Br. at 22). Petitioners similarly claim that §1391(e) is limited to actions in the nature of mandamus. (Pet. Br. at 9).

As we explained above, much of the confusion on this score results from the fact that Congress dealt with two separate matters in one statute, i.e., mandamus actions under §1 of the statute and venue generally for civil actions under §2 of the statute.

The govenrment seeks to support its argument by a review of the legislative history (Govt. Br. at 27-37) which carefully ignores all the clear demonstrations of an intention to encompass damage actions which we have discussed above. Finally, the government has to acknowledge

that the Committee did in fact say that it did intend to include damage actions. At this point, the government employs language by which it seeks simply to wave away what the Committee said. The Court is told that the reference to damage actions "is odd because...there was no venue problem in damage actions against government officials."[31/] (Govt. Br. at 42). The government continues, "The committee's statement - otherwise wholly unexplained - is enigmatic" and "is too fragile a basis" (ibid) to sustain venue in this case. (emphasis in all quotations is added).

31/ Of course there were such problems. In 1962 plaintiffs were restricted in diversity actions to the judicial district where all plaintiffs or all defendants resided. In non-diversity cases, the venue was restricted to cases where all defendants resided. The amendment to paragraphs (a) and (b) of §1391 to permit suits where the cause of action arose did not come into being until 1966 (Pub. L. No. 89-714, Sec. 1, 80 Stat. 1111.) Sec. 1391(e) eased the pre-1962 requirements very considerably in suits against federal officials. See discussion supra at 85-92.

The only enigma here is the government's argument, which ignores the language of the statute and the legislative history outlined above. This history demonstrates that the Committee knew exactly what it was doing and that it intended to include damage actions within the statute.

4. The government (Govt. Br. at 38) and the petitioners (Pet. Br. at 17) both argue that §1391(e) does not apply to a suit against a federal official unless it is "in essence against the United States," relying on the following language of the Report:

> It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also in essence against the United States, but are brought against the officer or employee as an individual only to circumvent what remains of the doctrine of sovereign immunity.

Petitioners and the government are reading "[i]t intends to include" to mean "[i]t intends to exclude all other" - an absurd reading of the Reports because it makes incomprehensible the following paragraph of the Committee Reports which appears on the preceding page.

> "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." House Report at 3.

The significant words in the foregoing statement are "seeking damages from him" (emphasis added) for acts done "without legal authority." Obviously, that does not describe a suit "in essence against the United States."

The government is aware of the inconsistence of its position, hence its effort to bury the Committee's "damage"

statement by referring to it as "odd" and "enigmatic." (Govt. Br. at 42). The petitioners cannot explain this language and so suggest that the lower court read it "in isolation." (Pet. Br, at 15).

All this comes about only because of insistence upon reading the Report so that it is inconsistent with itself whereas in fact there is no reason to read it that way.

If the Report were read for what it says -- namely that Congress intended to include actions which are in essence against the United States but also actions for damages against "him" (the official) for conduct which is "without legal authority" then there is no inconsistency and all sections of the Report are meaningful.

This reading is the only reading which gives content to the Committee's reaction to the letter of Deputy Attorney

General Walsh, to the testimony of Justice Department Attorney MacGuineas and to the letter of Deputy Attorney General White, and the subsequent memorandum of Deputy Attorney General Katzenbach.

By referring to the 1976 amendment, the First Circuit in Driver v. Helms, supra, gives a further response to this.

Obviously, by including in this statute suits against individuals who were not federal employees at all, Congress made clear that it did not read the statute as being limited to suits "in essence against the government." Supra p.47

5. The petitioner's argument (Pet. Br. at 9) that the statute was not intended to give access to the Federal courts to an action which could not prior to the statute be brought in the United States District Court for the District of Columbia, presents a confusion of the legis-

lative history based on the two-part nature of the statute as it passed Congress, supra at 36 n.11 . The intention to extend jurisdiction to District courts outside the District of Columbia applies to that part of the Venue and Mandamus Act of 1962 which became 28 U.S.C. §1361. It deals with subject matter jurisdiction in respect to mandamus. The amendment of to §1361 does indeed expand the subject matter jurisdiction of all the district courts so that their jurisdiction in mandamus actions is co-extensive with that of the District Court for the District of Columbia.

None of this concerns §1391(e) which expands venue "generally" and provides a means for the district courts to acquire in personam jurisdiction in all non-mandamus suits against federal officers or agencies which in fact were never

limited to the District of Columbia.

6. The government argues (Govt. Br. at 47) that then Deputy Attorney General Katzenbach's letter of September 18, 1962 (108 Cong. Rec. 20079) and the President's statement when he signed the bill on October 5, 1962 somehow affect the impact of that portion of the bill which amended §1391(e).

Mr. Katzenbach's letter on its face related exclusively to that portion which related to 18 U.S.C. §1361. His proposed change went exclusively, as he said, to "the language of proposed Section 1361." (Ibid).

It is significant that Deputy Attorney General Katzenbach stated in his letter that if the proposed change was adopted then the Justice Department as well as the Treasury Department would support the bill. (Ibid). It was clear

that the Justice Department was not going to get all the changes requested in former Deputy Attorney General White's letter, which also sought changes in the §1391(e) portion of the bill (discussed supra) and that the Department's prime concern remained that §1361 would be "applied to discretionary acts of Federal Officers." (Letter of Deputy Attorney General White, infra at 9a). This view of Mr. Katzenbach's letter immediately preceding the enactment of the statute is the only reading which is consistent with Mr. Katzenbach's memorandum of three months latter when he explicitly recognized that the bill encompassed damage actions.

The government insists in reading Mr. Katzenbach's letter to mean something different from what it said, which leaves no alternative but to say that Mr. Katzenbach was "wrong" in his letter of three

months later. (Govt. Br. at 49 n.34).

In the same way it is clear that the President's statement drafted by Mr. Katzenbach referred exclusively to the mandamus portion of the bill and cannot effect an amendment of the clear language of 28 U.S.C. §1391(e).

7. Petitioners argued that the lower court, in referring to the letter from then Deputy Attorney General White, was relying "upon unpreferred sources of legislative history." (Pet. Br. at 20). It is clear, however, from our discussion of the legislative history that then Deputy Attorney General White's letter brought the damage action issue clearly to the attention of both the Senators and the members of the House of Representatives before the bill in its final form was passed. Furthermore, the letter in question was but one of a series of items

all of which lead inexorably to the conclusion that Congress intended to include damage actions and said so in its Reports and in the language of the statute.[32/]

When all of the legislative history is carefully examined, there can be no doubt that Congress knew that damage actions would be covered by §1391(e) in the form in which it was passed and that Congress intended that damage actions should be covered.

32/ While the petitioners criticize the lower court for relying upon what they consider to be "unpreferred sources of legislative history" they rely upon a statement of the original sponsor who introduced a bill which referred only to official actions - ignoring that it was the House Committee that added the phrase "or under color of legal authority."

III

THE STATUTE PROVIDES A MEANS OF ACQUIRING IN PERSONAM JURISDICTION THROUGH SERVICE BY CERTIFIED MAIL.

It is clear that the language of §1391(e) provides a means for obtaining personal jurisdiction over federal officials as well as delineating where venue shall be proper in such suits. The relevant part of §1391(e) provides:

> ... delivery of the summons and complaint to the officer ... as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

That is exactly how petitioners were served in this case, and such service gave the District Court personal jurisdiction over them.

We turn now to an argument made by petitioners, though seemingly no supported

by the government, i.e., that even if §1391(e) is considered applicable to damage actions, it provides venue but does not provide for personal jurisdiction -- which petitioners claim must be acquired by some means other than the service by certified mail as provided by the statute.

Petitioners attempt to brush away the clear language of the statute by maintaining that it governs nothing more than the mechanics of service and represents nothing more then a statement as to where process can be delivered. Petitioners in effect ask this Court to add to the actual language of the statute "only when in personam jurisdiction is otherwise independently established." (Pet. Br. at 18). Congress did not put that qualification into the language of the statute.

There is no doubt that in mandamus type actions against federal officials,

personal jurisdiction can be acquired over such officials through service under §1391(e). Implicit in petitioners' argument is that, when damages are sought from the pocket of a federal official, §1391(e) cannot be used to secure personal jurisdiction, but that if mandamus relief is sought precisely the same language can be used to meet service requirements.

Aside from the incongruity of dealing with service differently depending on whether the cause of action is for damages or for mandamus, the main difficulty with petitioners' argument is that it finds no support in the language or the legislative history of the statute. Beyond that, the Committee Reports explain that the provisions for service by mail were inserted for the specific purpose of providing a mechanism for effective service over federal officials beyond the terri-

torial limits of the State in which a district court where a case is brought is located. The statute allows extra-territorial service on federal officials, thus implementing the new venue provisions. It is absurd to suggest that personal jurisdiction needs some additional foundation.

Thus, the 1960 House Report No. 1936[33] says:

> In order to give effect to the broadened venue provisions of this bill, it is necessary to modify the service requirements under the Federal Rules of Civil Procedure insofar as they apply to actions made possible by this bill. Rule 4(f) restricts effective service to the territorial limits of a State in which the district court is held unless a statute specifically provides for it to go beyond the territorial limits of that State. Since this bill is designed to make a federal official or agency amenable to suit locally, the bill provides that the delivery of the summons and complaint to the offi-

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33/ This same paragraph is also contained in the 1961 House Report No. 536 at 4.

> cer or agency may be made by certified mail outside of the territorial limits of the district in which the action is brought. In all other respects, the summons and complaint is to be served as provided by the Federal Rules of Civil Procedure.[34/] (emphasis supplied)

Clearly "amenable to suit" (ibid) means getting personal jurisdiction over the official.

In §1391(e), Congress provided for more generous venue provisions than had previously existed and also provided for personal service by certified mail, thus making those new venue provisions usable

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34/ As we explained, supra at 63,n.20,the provisions for service of process were modified when the House altered the venue provisions to include suits against officers acting "under color of legal authority." Under the original version of the bill, only the United States Attorney had to be served; but when the statute was broadened in scope,necessarily provision had to be made for service on the individual, since his own pocket could be involved.

and effective. It would have been a useless act to provide for broader venue and not to take proper steps to provide for personal jurisdiction as well. The court below agreed that the provisions for extra-territorial service of process fit within the wording of the statute. The court said:

> [W]hile the amended section retains the rules intact for service within the forum district it empowers the district courts to make valid service outside the district whenever venue lies by virtue of Section 1391(e). It also authorizes service by certified mail in such situations whenever service can be effected only beyond the boundaries of the forum district. Nowhere is there any intimation that these changes were to affect some cases controlled by Section 1391(e) and not others, and indeed any exception would be difficult to justify. That venue exists in a particular district would hardly console a plaintiff unable to serve officials who, though responsible for his plight, had withdrawn beyond the limits of effective service. And Congress must not have been content to rely simply on state long-arm statutes, for it

> chose to supplement them in the category of cases encompassed by Section 1391(e) by providing extra-territorial service of its own device. We find the service effected here to be fully within the ambit of congressional contemplation. Pet. App. at 13a-14a (footnotes omitted).

The First Circuit in Driver v. Helms, supra, 577 F. 2d at 156, agreed, saying: "to the same extent that §1391(e) supplies venue, it supplies the mechanism to secure personal jurisdiction." (Ibid.)

In the Driver v. Helms case, the court pointed out that the provisions for service of process were discussed by Judge Maris at the House Hearings. He said:

> Now what you would have to do here it seems to me would be to provide for the service that we discussed, namely, service upon the U.S. Attorney, service by mail upon the Attorney General, and also service by mail anywhere in the United States upon the officer or agent being sued.
>
> That would take care of it

> because all that is necessary is for Congress to authorize service to be made outside of the District, and it is perfectly valid to do so. Hearings at 88-89. Driver v. Helms, supra at 156.

As the First Circuit Court explained:

> Congress, following Judge Maris' suggestion, provided nationwide service of process by mail and expected that broadening service would correspondingly broaden personal jursidiction. Ibid.

Other circuit courts and district courts agree with the court below and with the First Circuit in Driver v. Helms, supra, that §1391(e) does provide that in personam jurisdiction may be acquired by service of process by certified mail in the manner provided for by §1391(e). See Liberation News Service v. Eastland, 426 F. 2d 1379, 1382 (2nd Cir. 1970), United States ex rel Garcia v. McAninch, 435 F. Supp. 240, 244 (E.D.N.Y. 1977), Environmental Defense Fund, Inc. v. Froehlke, 384 F. Supp. 338, 364 (W.D. Mo. 1972)

aff'd on other grounds, 477 F. 2d 1033 (8th Cir. 1973); American Civil Liberties Union v. City of Chicago, 431 F. Supp. 25, 30-31 (N.D. Ill. 1976); Maceas v. Finch, 324 F. Supp. 1252, 1254-55 (N.D. Cal. 1970). U.S. ex rel Rudick v. Laird, 412 F. 2d 16 (2nd Cir. 1969), and Smith v. Campbell, 450 F. 2d 829 (9th Cir. 1971), the two §1391(e) cases relied on by petitioners for the contrary position, i.e., that §1391(e) does not provide a method for acquiring in personam jurisdiction, are both habeas cases which are governed by special limitations. See discussion, supra at 48.

Deputy Attorney General Katzenbach in his "Memorandum to all United States Attorneys"[35/] written shortly after the

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35/ The relevant portions of Deputy Attorney General Katzenbach's Memorandum are printed in Appendix C to this brief at 16a-21a, and discussed in Point II, supra.

the statute was passed, also recognized that the provisions of §1391(e) for service by certified mail "modifies Rule 4(f) F.R.C.P., so as to enable service to be made on the Government official or agency named as a defendant outside the state in which the district court is held," infra at 19a (footnote omitted).

There is no question of the correctness of the statement of the First Circuit in Driver v. Helms, supra at 155.

> If Congress, by §1391(e), authorized service of process beyond the geographical limits that F.R.Civ.P. 4(f) would otherwise impose, and if such service does not violate the Constitution, then service was properly made in this case, and the court properly acquired jurisdiction over the persons of the appellants.

IV.

THE APPLICATION OF §1391(e) TO PETITIONERS IN THIS CASE DOES NOT VIOLATE THE PRINCIPLES OF DUE PROCESS.

Petitioners argue that the interpretation given to §1391(e)by the court below would render its application to petitioners unconstitutional and deprive petitioners of due process of law. Petitioners' argument is essentially the same as that which the government (then representing petitioners) unsuccessfully presented to the court below. In its new role as amicus, the government has reversed its previous position and, realizing that the success of petitioners' argument "would require at least some [other federal] statutes to be declared invalid" (Gov't. Br. at 2, n. 1), concedes that there is no Due Process Clause violation in the application of §1391(e) to the instant case.

Petitioners' argument really amounts to claiming that it "is fundamentally unfair" (Pet. Br. at 24) to subject them to a forum with which they have "no nexus" (Ibid) and that "because of the intolerable burden on their right to defend" (Id. at 25) they "are deprived of fifth amendment due process." (Id. at 24-25).

Petitioners acknowledge that (Pet. Br. at 25 n.8) as this Court held in Robertson v. Railroad Labor Board, 268 U.S. 619, 622 (1925), "Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court" and that the Court has reaffirmed that position in Mississippi Publishing Corp. v. Murphee, 326 U.S. 438 (1946) and in Yakus v. United States, 321 U.S. 414 (1944). (Pet. Br. at 25 n.8). Their argument thus comes down to a claim

that the Fifth Amendment imposes due process limitations on the power of Congress to determine where suits may be brought in the federal courts. Petitioners' argument that §1391(e) would be unconstitutional if interpreted as covering damage actions is without merit.

As long ago as 1838, this Court said in Toland v. Sprague, 12 Pet. 300, 37 U.S. 300, 328:

> Congress might have authorized civil process from any circuit court to have run into any State of the Union.

Accord, Robertson v. Railroad Labor Board, supra. In §1391(e), Congress, by permitting service of process anywhere in the United States in cases such as the instant case, did precisely what this Court said Congress could constitutionally do.

Petitioners concede (Pet. Br. at 26), as they must, that they canot rely on the

territorial sovereignty aspect of International Shoe Co. v. Washington, 326 U.S. 310 (1945) and of related cases. Obviously, territorial limitations upon the exercise of state court jurisdiction cannot govern the federal courts.

Petitioners argue, however, that Congress' power to legislate with respect to in personam jurisdiction of the federal courts is limited by "traditional notions of fair play and substantial justice" concerning procedural due process and the right to defend.

The court below rejected that argument [35] stating:

> Nor do we perceive any constitutional problem in the statute as applied to this case. Appellees [petitioners here] pitch their constitutional argument on their supposed lack of minimum contacts

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35/ At that time, petitioners were represented by attorneys from the Department of Justice.

with the District of Columbia, resting on cases holding 'that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries.' To the extent that this position presupposes that Congress' constitutional authority to provide for the sound operation of the federal judicial system is limited by the same constraints that apply to extraterritorial service by state tribunals, it builds on sandy soil indeed. . . . While several cases have asserted apodictically that service outside a federal judicial district is governed by the same sort of 'fairness standard' as is extraterritorial service by state courts, this imputes a constitutional magic to lines that Congress can at any time redraw. As tradition alone works no such necromancy, we must reject appellees' constitutional argument as well. Pet. App. at 14a-18a, (footnotes omitted).

The First Circuit came to the same conclusion, stating:

> The United States, however, whose court is here asserting jurisdiction, does not lose its sovereignty when a state's border is crossed. The Constitution does not require the federal districts to follow state boundaries. That decision was made by Congress, and Congress could change its mind. Driver v. Helms, supra at 156.

The First Circuit said about the problems of minimum contacts:

> We see no reason why the United States does not have the same power over defendants within its borders [as a state does over persons found within its borders]. Even if we were to say minimum contacts had to be established, anyone found and served within the United States would have sufficient contacts with the United States. Id. at 156 n.25.

The Seventh Circuit, in its recent opinion in Fitzsimmons v. Barton, 589 F. 2d 330 (1979), rejected an attempt to impose the "fairness" standard and accompanying procedural due process limitations laid down in International Shoe Co., supra, and Shaeffer v. Heitner, 433 U.S. 186 (1977), as a constitutional limitation on the exercise of federal jurisdiction.

The court said:

> Although Shaffer and International Shoe speak directly only of state court jurisdiction, the broad articulation of a fairness standard (in opposition to a territorial standard) in both opinions requires a further inquiry to determine what, if any, restrictions Due Process imposes on federal jurisdiction over persons.
>
> * * *
>
> It is clear, therefore, that the 'fairness' standard immposed by Shaffer relates to the fairness of the exercise of power by a particular sovereign, not the fairness of imposing the burdens of litigating in a distant forum. Fitzsimmons v. Barton, supra at 332-33. (footnotes omitted),(emphasis supplied).

Even if "traditional notions of fair play and substantial justice" would limit the jurisdiction of inferior federal courts, the petitioners can hardly show a denial of Due Process in this case for the following separate and distinct reasons.

We start with the general proposition

pointed out by the First Circuit in Driver v. Helms, supra at 157, where the court said:

> We note that officers of the federal government are different from private defendants because they can anticipate that their official acts may affect people in every part of the United States.

What is more, as this Court recognized in Bivens v. Six Named Unknown Agents, supra, "an agent acting -- albeit unconstitutionally -- in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." Id. at 392.

As applied to the instant case, petitioners' arguments as to fair play and justice have a particularly hollow ring.

A. The actual burden upon the petitioners in this case is quite ephemeral. Whatever may be the situation in other

cases, here the government has furnished or paid for petitioners' counsel, who function out of either Washington, D.C. or New York.

Originally, petitioners were represented by Department of Justice attorneys. The Solicitor General decided not to apply to this Court for certiorari, but the government agreed to pay the fees and expenses of private counsel to seek certiorari from this Court for petitioners. The government continued to act as counsel in the case in the District Court until several months after the petition was filed in this Court. Petitioners' contention that some federal employee may not be defended by the Department of Justice is too hypothetical to require the attention of this Court. Unlike a private citizen who is a defendant, federal officials, when named as defendants, have the full resources of the government

at their disposal. Not only do petitioners have private attorneys at taxpayers' expense, but the government has submitted a lengthy amicus brief on their behalf as well.

Respondents are being represented by unpaid counsel provided by the Center for Constitutional Rights. In Colby v. Driver, supra, the case being argued in tandem with this case, respondents are being represented by unpaid counsel provided by the American Civil Liberties Union. However, most plaintiffs do not have the same benefit. On the other hand, prospective defendants can always be assured of free counsel at government expense.

Petitioners further raise the specter that defendants will be burdened by repeated appearances in a far away jurisdiction in "lengthy" litigation such as this.

This case has been litigated since 1974 and petitioners, in their role as defendants, have never once appeared at a single proceeding nor have they ever been asked or required to appear. What is more, should the District Court determine that it is too burdensome for defendants to be deposed in Washington, D.C., the place where the court hearing this case is located, the court could direct that plaintiffs take defendants' depositions in defendants' home district.

B. This suit against federal officials is being brought at the seat of government and within the district where one of the defendants has his office and where petitioners' department headquarters are located. This is hardly a case where respondents arbitrarily chose a far-away district which had no real meaning in terms of the case itself.

When an action such as this is brought at the seat of the federal government and charges government officials with conspiring together to deprive citizens of their rights, the District of Columbia is a proper forum. A statute designed to relieve citizens from <u>having</u> to sue in the District of Columbia should not be turned on its head to <u>prevent</u> citizens from coming here.

C. There is nothing "local" about the instant case. If the Department of Justice had considered the underlying criminal matter out of which it arose to be a local (Florida) matter, the Department would not have sent defendant Guy Goodwin "as a Special Attorney under the authority of the Department of Justice" (Letter on July 7, 1972 from Ralph E. Erickson, Deputy Attorney General appointing Guy Goodwin of the Internal Security

Division, Department of Justice, Washington, D.C., as Special Attorney in the Northern District of Florida) to act in Florida in connection with the grand jury and trial out of which this case arose.

The Fifth Circuit in its recent decision in United States v. Briggs, 514 F. 2d 794, 805-806 (1975),[36] recognized the connection between the grand jury and criminal trial of respondents and the

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36/ That case involved an application which was denied by the Florida District Court but granted by the Fifth Circuit to strike the names of respondent Robert Wayne Beverly and John Chambers (now a plaintiff in the ongoing suit in the District Court against defendant Goodwin) from the criminal indictment in United States v. Briggs, supra at 5, 5 n. 2. The two had been named in the indictment as unindicted co-conspirators. At the time the application was made, the eight respondents who were named as defendants in the indictment had already been tried and found not guilty by a jury.

countrywide federal government prosecutions of anti-war activists and other disfavored persons and groups. United States v. Briggs, supra at 805 n.18, 806.

The Fifth Circuit said:

> There is at least a strong suspicion that the stigmatization of appellants was part of an overall government tactic directed against disfavored persons and groups. Id. at 806.

The Fifth Circuit, in its opinion striking the names of Beverly and Chambers from the indictment, cites Note, Federal Grand Jury Investigation of Political Dissidents, 7 Harv. Civ. Rts-Civ. L. Rev. 432 (1972). The note states:

> [U]se of federal grand juries to investigate the activities of political dissidents [was] [l]argely engineered and coordinated by the Justice Department's Internal Security Division . . . Ibid. (footnotes omitted).

The note repeatedly refers to the involvement of defendant Goodwin, head of the

Special Litigation Section of the Internal Security Division in grand jury investigations throughout the country.

D. District courts can transfer cases where necessary in the interests of justice. As pointed out by the First Circuit in Driver v. Helms, supra at 157:

> We acknowledge that these appellents may have to answer complaints in a broader range of judicial districts than would non-governmental defendants. But they are not without protection. A district court has broad discretionary power '[f]or the convenience of parties and witnesses, in the interest of justice, [to] ... transfer any civil action to any other district ... where it might have been brought.' 28 U.S.C. §1404(a). We would expect courts to be sympathetic to motions for change of venue when defendants would otherwise be substantially prejudiced and when there is an alternative venue that would protect the parties' rights.

Thus, the power of the district court to effect a change of venue in an appropriate case is the obvious safety valve to complaints of unfairness.[37/]

Petitioners, who express much concern about fairness for themselves, seem to have little concern about fairness for the respondents. What petitioners are really seeking is that respondents, who were brought from many far away states to Florida to defend themselves before a grand jury and in a criminal trial, must bring two separate suits to vindicate their rights -- one in Florida against petitioners and one in the District of Columbia against defendant Goodwin -- even though the defendants are charged with acting in concert. Alternatively, if re-

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37/ Petitioners' change of venue motion was denied by the District Court (Pet. App. at 20a-24a).

spondents want one suit, they must sue in the jurisdiction where petitioners have most impact upon jurors and judges.[38/]

These are rather perverted notions of "fairness." The Congress' main concern when it enacted this legislation was to consciously ease the litigation burden upon plaintiffs suing federal officials. See discussion supra at 32. By their arguments, petitioners have sought to turn the matter around so that the citizen may have to run all over the country, bear the expense of a far away forum or unnecessarily multiple lawsuits, and be relegated to an unfavorable forum -- all to serve the convenience of the defendants.

38/ See supra at 33 n.10.

Petitioners are defining "fairness" for their own narrow benefit to "pick" a forum favorable to themselves. When the enormous power of government has been misused by federal officials who have gone beyond the scope of their authority and who have used the color of official authority to violate the rights of citizens, it is not fairness to make it as hard as possible for citizens to seek redress in the courts. That was what the Congress well understood.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

U.S. Department of Justice,
Office of the Deputy Attorney General,
Washington, D.C.

Hon. Emanuel Celler,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice concerning H.R. 10089, a bill to permit a civil action to be brought against an officer of the United States in his official capacity, a person acting under him, or an agency of the United States, in any judicial district of the United States where a plaintiff in the action resides.

This bill seeks to permit civil actions to be brought by a plaintiff in the district in which he resides, against officers of the United States in their

official capacity, a person acting under such official, or an agency of the United States. The bill further provides that service on such defendant may be accomplished by delivering a copy of the summons and complaint to the U.S. attorney, or to his designee, in the district in which the action is instituted.

Most actions are brought against a public official (or Government agency) either (1) to enjoin him from taking action asserted to be beyond his official authority and in violation of some legal rights of the plaintiff or (2) to seek damages from him personally for actions taken ostensibly in the course of his official duty but which the plaintiff claims are in excess of his official authority. It is a basic legal concept that both of these types of actions are

against the official in his individual capacity.

The only type of suit which might be brought against a Government official (or agency) in his official capacity would be the equivalent of a writ of mandamus or mandatory injunction which would compel the official to perform his duty. The Supreme Court has repeatedly upheld decisions that the authority to issue a writ of mandamus to an officer of the United States commanding him to perform a specific act, required by the law of the United States, rests solely with the U.S. District Court for the District of Columbia. H.R. 10089 relates only to venue and this bill would not confer mandamus jurisdiction on courts other than the district court for the District of Columbia.

Inasmuch as the types of actions which could be instituted by a plaintiff against an official are limited as set forth above, it does not appear that the enactment of H.R. 10089 would serve any useful purpose.

Further, with regard to the provisions in the bill for service upon Government officials and agencies, rule 4(d) (4) and (5) of the Federal Rules of Civil Procedure requires that a summons and complaint must be served upon an officer or agency of the United States, not only by delivery of a copy to the U.S. attorney for the district in which the action is brought as provided in Section 2 of the bill, but also by sending a copy of the summons and complaint by registered mail to the Attorney General and by delivering a copy of the summons and complaint to

the sued officer or agency. Those additional requirements provide, of course, a more effective method for insuring that the defendant himself will promptly receive notice of the suit against him than do the provisions of this bill.

On the basis of the foregoing, the Department of Justice is unable to recommend enactment of this legislation.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

Lawrence E. Walsh,
Deputy Attorney General.

APPENDIX B

Department of Justice,
Office of the Deputy Attorney General,
Washington, D.C., February 28, 1962.

Hon. James O. Eastland,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

Dear Senator:

This is in response to your request for the views of the Department of Justice on identical bills S. 20 and H.R. 1960 (H.R. 1960 passed the House on July 10, 1961) to amend chapter 85 of title 28 of the United States Code relating to the jurisdiction of the U.S. district courts, and for other purposes, and related bill S. 717 to authorize civil actions for the review of administrative determinations as to the use of lands of the United States for grazing purposes to be instituted in judicial districts in which

such lands are situated, and for other purposes.

The pending companion bills, H.R. 1960 and S. 20, are general in scope and as to purpose, similar to S. 717 which relates to determinations concerning the issuance of grazing permits only. If the companion bills, or modified versions thereof, are passed by the Congress, consideration of S. 717 would appear to be unnecessary because the problems it seeks to meet are adequately covered in the broader proposals.

Section 1 of the companion bills (H.R. 1960 and S. 20) would extend to all U.S. district courts jurisdiction to issue writs in the nature of mandamus.

This Department questions the wisdom of authorizing district courts generally to mandamus Cabinet officers and other

Government officials who are presently suable, if at all, only in the District of Columbia. However, if either S. 20 or H.R. 1960 is to be given further consideration by the Congress, the provisions of the bills should be clarified.

While the stated purpose of section 1 is to extend the mandamus powers of the District Court for the District of Columbia to the several district courts throughout the Nation, the language of the section is dangerously broad. Courts interpreting the mandate to require a Federal officer "to do his duty" might find a much greater power intended than the existing mandamus power in the District of Columbia court to which the proposed statute does not refer explicitly or implicitly. We think it essential that the section refer to the "mandamus" power

and specifically limit its exercise to ministerial duties owed the plaintiff. Should the language be applied to discretionary acts of Federal officers, the judicial branch would be invading the executive or legislative function in violation of the doctrine of separation of powers. Clearly the judiciary can compel executive action (or legislative action) only where there is an absolute obligation to act in connection with which no discretion exists.

The venue provision in section 2 covers an entirely different subject. Under present law, after one has exhausted his administrative remedies, the final decision is generally made by an official residing in the District of Columbia. To challenge the legality of that decision, the officer residing in Washington must

be sued in Washington. The purpose of this section of the bill is to have officers who live in the Capital subject to suit throughout the country to the same extent that they can now be sued in the District. In effect, then, this venue provision would do away with the defense that a superior officer is an indispensable party because with a grant of venue, a superior officer can be made a party.

The Administrative Procedure Act contains an expression of existing congressional purpose relating to review of the acts of Federal officers. For venue reasons, however, practically all proceedings for review under that act must be brought in the District of Columbia. We believe that less confusion will result by tying in this simple venue grant directly to the Administrative Procedure

Act. This unquestionably eliminates suits for money judgments against officers, eliminates any question that a discretionary action can be reviewed, and requires an exhaustion of administrative remedies. It will do away with any possible future contention that the legislation was intended to add any additional substantive right of appeal. It would thus achieve what we understand to be the purpose of the sponsors within the framework of existing legislation.

The pending bill would place venue in any judicial district "wherein the plaintiff resides." We recommend that this be changed to grant venue in any judicial district "in which the cause of action arose, or in which any property involved in the action is situated." The principal demand for this proposed legis-

lation comes from those who wish to seek review of decisions relating to public lands, such as the awarding of oil and gas leases, consideration of land patent applications and the granting of grazing rights or other interests in the public domain. The applicants may reside in any State, or several States of the Union, and it would be unwise to have the Secretary sued in Maine with respect to an oil and gas lease in Wyoming. On the other hand, there is no objection to permitting one who has done business involving land in Wyoming to bring any suit concerning that land in the State where it is located.

Without recommending legislation in this field, we have drafted revised language to accomplish the purposes stated for the subject bills, which contains minimal safeguards to the national inter-

est in management of the public domain, in maintenance of separation of powers, and to minimize fruitless litigation. As to the provision conferring mandamus jurisdiction, it is recommended that a new section 1361 of title 28 of the United States Code proposed to be added by section 1 of S. 20 and H.R. 1960 be revised to read as follows:

"§ 1361. Action in the nature of mandamus

"The district courts shall have jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or of any agency thereof to perform a ministerial duty owed to the plaintiff under a law of the United States."

As to the provision for venue, it is recommended that the new subsection (e)

proposed to be added to section 1391 of title 28 of the United States Code by section 2 of the bill be revised to read as follows:

"(e) Except where a special statutory proceeding for judicial review relevant to the subject matter is provided in any court specified by statute, a civil action for judicial review of agency action under section 10 of the Administrative Procedure Act (60 Stat. 243, § 10; 5 U.S.C. § 1009) may be brought in any judicial district as above provided or in any judicial district in which the cause of action arose, or in which any property involved in the action is situated.

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that delivery of the summons and complaint

to the officer as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

In order that there may be no misunderstanding in connection with administration of the tax laws of the United States, it is recommended that an additional section be added to the bill as follows:

"§ 3. This Act shall not apply to proceedings brought with respect to Federal taxes."

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

Byron R. White,

Deputy Attorney General

APPENDIX C

DEPARTMENT OF JUSTICE

WASHINGTON, D.C.

January 18, 1963

Memo No. 337

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

Subject: Public Law 87-748, 76 Stat. 744, approved October 5, 1962.

* * *

This law will no doubt result in a substantial number of suits being brought in your districts against Government officials. The following material should be helpful in defending such suits.

* * *

B. The venue provision is applicable to suits against Government officials and agencies for injunctions and damages as well as suits for mandatory relief. By including in the venue provision the phrase "or under color of legal authority," the statute makes the expanded venue applicable not merely to actions for mandatory relief but also to actions in which the defendant Government official is alleged to have taken or is threatening to take action beyond the scope of his legal authority although purporting to act in his official capacity.[9/] See

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9/ The House Report, pp. 3, 4, states: "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in

(fn. continued on next page)

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579; Philadelphia Co. v. Stimson, 223 U.S. 605. As an example, suits for damages for alleged libel or slander by Government officials (which the Department defends on the ground that statements made by a Government official within the scope of his authority are absolutely privileged; Barr v. Matteo, 360 U.S. 564; Howard v. Lyons, 360 U.S. 593) fall within the venue provision of this statute. This statute

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(fn. continued from preceding page)

the course of performing his duty ... By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen."

has no application to a suit brought against a Government official with respect to an act in the performance of which he purported to act as a private individual, not as an official. The Department does not, of course, represent Government officials in such cases.

* * *

Service of summons and complaints. The final paragraph of this law modifies Rule 4(f), F.R.C.P., so as to enable service to be made on the Government official or agency named as a defendant outside the state in which the district court is held.[12/] It is still essential

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12/ The House Report, p. 4, provides: "In order to give effect to the broadened
(fn. continued on next page)

that a copy of the summons and complaint be delivered to your office, that a copy be sent to the Attorney General by regis-

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(fn. continued from preceding page)

venue provision of this bill, it is necessary to modify the service requirements under the Federal Rules of Civil Procedure insofar as they apply to actions made possible by this bill. Rule 4(f) restricts effective service to the territorial limits of a State in which the district court is held unless a statute specifically provides for it to go beyond the territorial limits of that State. Since this bill is designed to make a Federal official or agency amenable to suit locally, the bill provides that the delivery of the summons and complaint to the officer or agency may be made by certified mail outside of the territorial limits of the district in which the action is brought. In all other respects, the summons and complaint is to be served as provided by the Federal Rules of Civil Procedure.

It is contemplated that where an action is only nominally brought against an official, as an individual, service may be had in the manner provided by Rule 4(d)(5). The exception to the territorial limitation on service provided in this bill would, of course, be equally applicable to that situation."

tered mail, and that a copy be delivered by certified mail to the defendant Government official or agency. Rule 4(d)(4)(5), F.R.C.P. Unless these requirements are complied with, the district court does not have jurisdiction over the defendant. Messenger v. United States, 231 F. 2d 328 (C.A. 2).

* * *

Nicholas deB. Katzenbach

Deputy Attorney General

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

IN RE: GRAND JURY WITNESS)
)
CASE NO. T MISC. 1/222)

C A P T I O N

The above-entitled matter came on to be heard before the Honorable David L. Middlebrooks, United States District Judge, at the U.S. Post Office Building, Tallahassee, Florida, on the 13th day of July, 1972, commencing at 10:37 A.M.

A P P E A R A N C E S

JAMES REIF, NANCY STERNS, DORIS PETERSON, and JACK LEVINE, 588 Ninth Avenue, New York, New York 10036, appearing on behalf of the Grand Jury witnesses.

CAMERON CUNNINGHAM, 502 West Fifteenth Street, Austin, Texas 78701 appearing on behalf of the Grand Jury

witnesses.

JUDY PETERSEN, 115 South Main Street, Gainesville, Florida 32601, appearing on behalf of the Grand Jury witnesses.

STEWART J. CARROUTH, Assistant United States Attorney, WILLIAM STAFFORD, United States Attorney, GUY GOODWIN, Assistant States Attorney, and STARK KING, Assistant United States Attorney, U.S. Post Office Building, Tallahassee, Florida, appearing on behalf of the Government.

Reported by
JERRY L. ROTRUCK
FEDERAL COURT REPORTER
P.O. BOX 928
TALLAHASSEE, FLORIDA
224-0722

[Tr.] 65

* * *

THE COURT:

Mr. Goodwin, take the witness stand. Swear the witness, Mr. Clerk.

Whereupon,

GUY GOODWIN

was called as a witness, having been first duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE COURT:

Mr. Goodwin, are any of these witnesses represented by counsel agents or informants of the United States of America?

THE WITNESS:

No, Your Honor.

THE COURT:

You can step down.

(Witness excused.)

MR. LEVINE:

Your Honor, may we be permitted to question Mr. Goodwin on this?

THE COURT:

No, unless you have some information that is [Tr. 66] contrary to what counsel for the Government has testified.

MR. LEVINE:

Might I just ask one question, Mr. Goodwin, does your representation apply to each and every of the named individuals as to whom this motion is made, including --

THE COURT:

That question was asked.

MR. GOODWIN:

Your Honor, I will answer the question the Court posed. I do not wish to be subjected to cross examination.

THE COURT:

You are not going to be. I have asked the question.

MR. LEVINE:

Your Honor, may I also ask whether Mr. Goodwin might represent to the Court whether or not he has caused any inquiries to be made by those with whom he has associated as to whether or not any of our clients have been used as informants, in this case.

THE COURT:

Well, now, I hope Mr. Goodwin understands that my question covered that. If he knows --

MR. GOODWIN:

I assumed that it did, Your Honor.

* * *

[Tr.] 71

* * *

MR. LEVINE:

As I understand the Court's ruling and representation by Mr. Goodwin that as to his own personal knowledge he is not aware or has no knowledge that any of our clients are being used as informants is being accepted by the Court as sufficient for the purposes of our motion.

Let me please state that it is our position that irrespective of the good faith of Mr. Goodwin's representation that we should be entitled to question him as to what, in fact, he knows about these witnesses, when he got into the case and how others perhaps unknown to him may be using the informants as to whom he has absolutely no knowledge. I am simply stating that for the record and asking that our objection be noted on that score.

THE COURT:

Mr. Goodwin, you, I assume, would have knowledge as to whether, from contacts with various agencies any of these represented witnesses are informants.

MR. GOODWIN:

I would assume so, Your Honor, yes,

MR. REIF:

[Tr.72] Your Honor, if I might suggest, that is one of the most unequivocated answers I have ever heard. While it is true, Mr. Goodwin may have knowledge --

THE COURT:

I may be in error, Mr. Reif, and if I am I can be corrected. I recognize obligations of an attorney to his client. I would bar the use of informers paid by the Government, represented by attorneys, I would abhord [sic] the use of those who might over hear conversations between counsel and other clients. I feel that

I have sufficiently inquired into the question as to whether any of these represented clients are informants, and I am going to deny the application for the disclosure of the names of informants.

[Tr. 1-2,65-66,71-72]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1546

WILLIAM H. STAFFORD, JR.,
STUART J. CARROUTH and
CLAUDE MEADOW,

Petitioners,

v.

JOHN BRIGGS, ET AL.,

Respondents.

On Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents insist that this Court should interpret 28 U.S.C. §1391(e) to "ease the burden" of their action against petitioners. Respondents are reluctant to try this action in Florida, where all the wrongful acts they allege took place and where the majority of respondents reside. None reside in the picked forum in the District of Columbia. App. 8. They read the statute to give them a virtually unlimited choice of forum because of their status as constitutional tort plaintiffs.

Respondents' desire for radical change in the law of jurisdiction and venue does not bear on the construction of what is in fact a narrow, technical statute, limited to actions in

essence against the United States. Whether civil rights plaintiffs—suing in essence against individual persons—should be allowed to shuttle federal employees about the United States is a question for Congress.

Respondents' 132-page argument consists of inconclusive bits and pieces from the background and foreground of the statute. Respondents for the most part ignore the House and Senate Committee Reports, recognized by this Court as the preferred source of legislative intent.

We submit respondents have not addressed the Committee Reports in context or with candor because respondents' essential position would explode.

The purpose and history of the Mandamus and Venue Act of 1962 as reflected in the Committee Reports make it clear that only actions in essence against the United States are included within its ambit. Those who bring actions in essence against federal officials for damages are treated the same as all other private litigants, who must follow normal and traditional procedures for obtaining jurisdiction and venue.

Respondents persist in reading Section 1391(e), Section 2 of the statute, in isolation—as if its companion section, 28 U.S.C. §1361, had nothing whatever to do with it and was concerned with an entirely different problem. Section 1391(e) is a necessary part of the two-part Mandamus and Venue Act —an act which covers precisely what its name states and no more.

The fatal flaw in respondents' argument is their premise that in 1962 Congress consciously legislated with *Bivens*-type damage actions in mind. This is inconsistent not only with the legislative history and purpose, but with the fact that such actions were not established until almost a decade later. Respondents employ this inventive but incorrect premise to create a distorted analysis of the legislative history. They vainly sift the legislative history for one express statement that Congress actually intended coverage of *Bivens*-type damage actions. Failing that, they look for a statement excluding *Bivens*-type damage actions. Failing that also, respondents claim that Section 1391(e) therefore creates jurisdiction over petitioners in this case. To the contrary, in order for respondents to prevail, they must show a clear expression of Congressional intent that this type of personal damage action was intended to be embraced by the Mandamus and Venue Act. This they cannot do.

Petitioners Stafford, Carrouth and Meadow were local federal officials stationed in the Northern District of Florida. All the acts complained of occurred there. Notwithstanding respondents' belated attempt here to connect petitioners with the District of Columbia, Resp. Br. 27-28, 125-126, Congress never intended to make these local officials subject to jurisdiction and venue throughout the nation. *Powers* v. *Mitchell,* 463 F.2d 212, 213 (9th Cir. 1972).

I.

THE DECISION BELOW IS INCONSISTENT WITH THE LANGUAGE OF SECTION 1391(e)

By taking a purportedly literal approach to the statute, respondents seek to demonstrate that the decision below was somehow compelled by the "plain meaning" of Section 1391(e).[1]

The language of the statute is wholly consistent with its limitation to actions in the *nature* of mandamus. The venue portion of the statute compliments the grant of mandamus jurisdiction and is addressed to one who "is acting" in his official capacity or under color of legal authority. If, as

[1] The fact that Section 1391(e) appears in Title 28 as a subdivision under a heading "Venue generally" should be of little comfort to respondents. This heading obviously refers to the topic of the entire section and not the subdivisions which are concerned with specific aspects of venue. The codification of the statute as a venue provision further confirms that it does not alone confer personal jurisdiction.

respondents erroneously contend, Congress meant to deal with damage actions asserting constitutional violations, this was an eccentric means of achieving that simple purpose. Petitioners submit that the statute means what it says—it controls venue and service in actions which concern present, ongoing official conduct.

Respondents say that this case "fits exactly within the statute." They reason:

> "at the time of the acts complained of, each [petitioner] was acting in his official capacity but beyond the scope of his authority, thus fitting within 'acting in his official capacity or under color of legal authority'". Resp. Br. at 31.

But Section 1391(e) embraces a "civil action in which a defendant is an officer acting" and not an action which alleges that at the time the acts complained of an officer *was* acting. When the statute is considered as a whole, it is clear that respondents read too much into it.

Respondents repeatedly refer to the passage of Section 1391(e) as one-half of the Mandamus and Venue Act as if that somehow supports their position. To the contrary, Section 1391(e) must be read together with its companion, Section 1361, as the Second Circuit emphasized in *Natural Resources Defense Council, Inc.* v. *Tennessee Valley Authority,* 459 F.2d 255 (2d Cir. 1972):

> "As already indicated, §1391(e) was not the whole statute which Congress enacted in 1962. It was the second section, the first being what has been codified as 28 U.S.C. §1361, and the two must be read together." *Id.* at 258.

The same observation is made in the House Report which states:

> "Section 2 is the venue section of the bill. Its purpose is similar to that of section 1. It is designed to permit an action which is essentially against the United States to be brought locally rather than requiring that it be brought in the District of Columbia simply because Washington is the official residence of the officer or agency sued." House Report at 2.

Respondents rely heavily upon the statute's use of the phrase "under color of legal authority" to support their plain meaning argument, insisting that the use of this phrase incorporates the jurisprudence of decisions involving state officers such as *Monroe* v. *Pape,* 365 U.S. 167 (1961), which dealt with the meaning of the phrase "under color of any statute, ordinance, regulation, custom or usage, of any State" as used in the Civil Rights Act of 1871.

The House Report, however, is explicit about the reason why the phrase "under color of legal authority" was used in the statute. The report specifically states that this phrase was used to cover actions against an official sued nominally in his individual capacity in order to circumvent the doctrine of sovereign immunity. House Report at 3-4.

There are two kinds of actions which involve official conduct taken under color of law. The first, discussed in *Ex parte Young,* 209 U.S. 123 (1908), and the Committee Reports, utilizes the "fiction that the officer is acting as an individual" in order to circumvent the doctrine of sovereign immunity.[2] The official is only a nominal defendant. *Nevada* v. *Hall,* 47 U.S.L.W. 4261 n.19 (U.S. March 5, 1979).

The second kind of action, recognized in *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971), nine years after Section 1391(e) was enacted, seeks damages from an official's personal resources. *See Land* v. *Dollar,* 330 U.S. 731 (1947). This kind of action, not being "in essence against the United States" was never contemplated or even discussed in the Committee Reports.

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[2] Respondents suggest that this kind of action cannot be the subject of an action in the nature of mandamus. Resp. Br. at 43. Obviously remedies of this nature, including those which seek the payment of money, are used to confine an official to his official duties.

Respondents try to paint a picture that Congress actually considered this second kind of action when it enacted Section 1391(e).[3] But the state of the law as it existed in 1962 demonstrates that it did not. As this Court noted one year later:

> "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law.***Federal law, however, supplies the defense, if the conduct complained of was done pursuant to a federally imposed duty***or immunity from suit.***Congress could, of course, provide otherwise, but it has not done so. Over the years Congress has considered the problem of state civil and criminal actions against federal officials many times. See Hart and Wechsler, The Federal Courts and the Federal System, 1147-1150. But no general statute making federal officers liable for acts committed "under color," but in violation, of their federal authority has been passed." *Wheeldin* v. *Wheeler,* 373 U.S. 647, 652 (1963).

Since it was then thought that personal damage actions against federal officials who improperly acted under color of authority did not arise under federal law, and, in any event were barred by the broad official immunity defense then prevailing, it is inconceivable that Congress meant to include *Bivens*-type damage actions in Section 1391(e).

---

[3] Although there is discussion of damage actions in the earliest stages of the House Committee debates on the 1960 draft statute, the Committee Reports, which the Congress had before it when it enacted the Mandamus and Venue Act, do not consider this second type of action.

II.

THE LEGISLATIVE PURPOSE AND HISTORY OF THE MANDAMUS AND VENUE ACT DEMONSTRATE CLEARLY THAT PERSONAL DAMAGE ACTIONS ARE NOT WITHIN ITS PURVIEW

Respondents' argument misconceives the purpose of the Mandamus and Venue Act; they presume that it was meant to facilitate tort suits against federal employees in their personal capacities. Respondents start their analysis with the text of H.R. 10089, the 1960 draft legislation, and conclude with the 1976 amendment.

The 1960 draft legislation clearly was limited to actions brought against federal employees in their official capacities.

Respondents say that Deputy Attorney General Walsh's letter to the House Committee advised that this draft would have no real effect because "it did not cover damage actions against federal officials for their acts outside the scope of their authority. . . ." Resp. Br. at 57-58. This is not what the letter says. It says that the draft would have no effect because it would not include any action brought against federal officials. It also describes the various types of such actions, but does not advocate that any particular type be included.

Respondents speculate that the reaction to Mr. Walsh's letter was to include everything he said was excluded. This implication is illogical and contrary to the remaining history of the statute.

Respondents turn to the House Judiciary Committee hearings ("Hearings") on the 1960 draft. They grasp onto Congressmen Poff's and Dowdy's preliminary reactions to a suggestion by a Justice Department witness, Mr. MacGuineas, that the House Committee assumed the statute would be limited strictly to mandamus actions. Hearings at 32. As a reading of the hearings in context as they immediately continue indicates, Congressmen Poff and Dowdy were talking about

including injunction actions and other actions in essence against the United States. *Id.* They were not suggesting that actions in essence against individual defendants be included.

Indeed, later, as the statute's scope developed, Congressmen Dowdy and Poff were convinced that the statute was not to include actions in essence against federal officials as individuals. Later in the hearings Congressman Dowdy stated clearly that he did not "understand that we [the Committee] have in consideration suits for money damages." Hearings at 87.

This view is consistent with that of the sponsor of the statute that he had "no intention of bringing tort actions against individual government employees." Hearings at 102.

Judge Albert Maris advised the Committee as Chairman of the Committee on Revision of the Laws of the Judicial Conference of the United States. He complained that from time to time the Committee had gotten off the track:

> "In the first place, I think we have been talking about subjects and types of litigation that are very far removed from what is really concerned in this case."
>
> "What we are really concerned with, as I understand it, is the opportunity to review Government actions that have taken place out in the states rather than having to come to Washington to review them." Hearings at 78.

Later, when responding to Congressman Dowdy's statement of his understanding that the Committee did not have in consideration suits for "money damages" against a person sued as an individual, Judge Maris said:

> "The only basis for a money damage suit is the old common law idea of suing a collector who has received money and presumably illegally and so you sue him and he has recoupment from the U.S. if he had just and reasonable cause but ordinarily I do not think suits for money damages would be involved." *Id.* at 87.

Congressman Dowdy replied: "That would not be covered by this." *Id.* at 87.

In any event, the intent of Congress cannot be determined from what a handful of congressmen and witnesses might say. *See* Jones, *Extrinsic Aids in the Federal Courts,* 25 Iowa L. Rev. 737, 750-53 (1940). As this Court has recognized, committee reports are the most useful documents in determining the intent of Congress. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976); *see* Note, *The Courts And Committee Reports,* 1 U. Chi. L. Rev. 81 (1933).

The principal documents relied upon by respondents are some unadopted suggestions made by the Department of Justice. Congressional inaction is doubtful authority. Further, contrary to what respondents say, not one of the pre-passage memoranda of the Department of Justice advocates that the statute be changed to eliminate personal actions against officials for money damages. The Department merely sought a clarification of the commonly understood Congressional purpose to *exclude* the possibility of such actions. With the benefit of hindsight, this concern hardly appears frivolous.

Respondents rely heavily upon a mimeographed advice memorandum to United States Attorneys under the typewritten name of Deputy Attorney General Katzenbach, which was written after the enactment of the statute. That memorandum, which cannot be considered legislative history, says that Section 1391(e) is applicable to suits against Government officials for damages for actions taken beyond the scope of authority, and gives libel suits as an example. The memorandum, however, expressly qualified this seemingly inconsistent remark by quoting the House Report's explanation of why the words "under color of legal authority" were used in the statute:

> "By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section

1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is *nominally* brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen." [emphasis added.]

Respondents also rely on the 1976 amendment to Section 1391(e), and adopt the *Driver* court's notion that its new joinder provision confirms that the 1962 statute covers actions seeking damages from an official. *Driver* insisted that it would make no sense to join a third party in a mandamus action. This is simply incorrect. Complete relief in an action in the nature of mandamus often cannot be secured unless state officials or private parties are joined. For example, where a farmer seeks mandamus to secure grazing rights on government land he may also need, at the same time, to eject another farmer wrongfully in possession.

The legislative history of the 1976 amendment expressly confirms that Section 1391(e) is "limited to judicial review actions". The Senate Judiciary Committee which considered the amendment stated:

"Joinder of Third Persons

A related problem concerns joinder of third persons as parties defendant. When section 1391(e) of title 28, which governs venue of actions against Federal officers and agencies, was enacted in 1962, its broadened venue and extra-territorial service of process were limited to judicial review actions in which each defendant is an officer or employee of the United States or an agency thereof." S. Rep. No. 996, 94th Cong. 2d Sess. at 17 (1976).

The Committee Report which discussed the 1976 amendment cited with approval the decision in *Green* v. *Laird*, 357 F.Supp. 227 (N.D. Ill. 1973), which held that the statute was applicable

to an action against the defendant Secretary of Defense in his nominal capacity, but was inapplicable as to those aspects of that litigation seeking damages from his personal assets. S. Rep No. 996, *supra* at 18. This is precisely the point urged by petitioners.

The final element of the legislative history upon which respondents repeatedly rely is a sentence quoted out of context from the Committee Reports which reads:

> "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." House Report at 3.

Petitioners' main brief (pp. 15-16) explains that certain actions seeking money damages *nominally* from federal officials faced precisely the venue problem which Section 1391(e) was intended to cure. There was no "venue problem" with personal damage actions against government officials. They could be and were sued in district courts all over—restricted in no way to the District of Columbia. When the Committee Reports are read as a whole, as they must be, it is clear that only those actions which presented the venue problem and were previously restricted to the District of Columbia are covered by the statute.

With this sentence from the legislative history disposed of, there is nothing which arguably supports respondent's position.

As petitioners pointed out in their principal brief, it makes no sense to assume that Congress addressed actions which could not then, as a practical matter, be brought in federal court. Respondents go to great lengths to show that attempts were being made in 1962 to bring personal damage actions against federal officials. While this may be so, there were no issues of jurisdiction and venue in such actions, then or now, other than those that arise in every civil action brought in

federal court. The legislative history of the statute clearly shows that only actions which were formerly restricted to the District of Columbia are within the scope of the statute.[4] Respondents' action cannot meet this test.

III.

PETITIONERS' DUE PROCESS CLAIM HAS NOT BEEN MET

Respondents fail to meet head on petitioners' constitutional claim that a construction of Section 1391(e) giving every district court personal jurisdiction over federal officials creates an intolerable burden on the right to defend and thus violates due process. Rather, respondents claim that "concern about fairness for the respondents" is overlooked if they, like all litigants, must meet the traditional jurisdictional and venue tests. The other aspect of respondents' answer is their claim that payment of legal fees by the Government eliminates due process concerns.

It is disingenuous to suggest that the payment of petitioners' counsel fees by the Justice Department somehow affects petitioners' due process rights. The burdens of litigation far from home are more substantial than the need to pay lawyers. Indeed, if lawyers are retained, they are ordinarily compensated whether an action is brought in a convenient or an inconvenient forum, and whether a defendant is a government official or not. Ironically, respondents themselves recognized quite dramatically in their complaint that defending a suit in a distant forum caused "the intense pain and suffering of having their lives so totally disrupted." App. at 17.

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[4] Respondents attempt to disregard the Court's discussion in *Schlanger* v. *Seamans,* 401 U.S. 487, 490 (1971), by arguing that habeas corpus actions fit within the "except as otherwise provided by law" phrase in Section 1391(e). This is unavailing since the habeas corpus statute does not, as respondents say, provide for venue or service of process. 28 U.S.C. §2241. Respondents have found no escape from the square holding in *Schlanger,* after review of the legislative history, that the statute was enacted "to broaden the venue of civil actions which could previously have been brought only in the District of Columbia." *Id.* at 490 n.4.

Payment of counsel fees, where made, is only a matter of grace. The government, through regulations promulgated by the Attorney General, may or may not pay the counsel fees of certain federal officials sued in their individual capacities. 28 C.F.R. §§50.15, 50.16. There is no assurance that such payments will continue through the litigation of this case. Indeed, since respondents' damage suit is based on a claim that petitioners acted beyond the scope of their employment, respondents impliedly take the position that petitioners are not entitled to government paid private counsel. 28 C.F.R. §50.16(a)(2)(ii).

The United States as *amicus curiae* has now adopted the position that the interpretation of Section 1391(e) by the court below is not violative of due processs. *Compare* the position of the United States in *United States* v. *Scophony Corp.,* 333 U.S. 795, 804, 818 (1948).

The United States submits that if petitioners' constitutional claim is adopted, the jurisdictional provisions of the interpleader, antitrust and securities laws might have to be declared invalid. There is no substance to this position since these laws, insofar as they permit service beyond a forum's jurisdiction, are carefully guarded and do not raise issues of fairness to defendants.[5]

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[5] In federal interpleader, 28 U.S.C. §§1397, 2361, the property is within the forum and is the subject matter of the litigation. This provides a fair basis for summoning the claimants into the forum to determine their respective rights to the property. *Shaffer* v. *Heitner,* 433 U.S. 186, 207-208 (1977). Indeed, it is likely that state courts could also exercise interstate interpleader jurisdiction consistently with fourteenth amendment due process for the reason stated by Justice Traynor in *Atkinson* v. *Superior Court,* 49 Cal.2d 338, 348, 316 P.2d 960, 966 (1957), *cert. denied,* 357 U.S. 569 (1958): "A remedy that a federal court may provide without violating due process of law does not become unfair or unjust because it is sought in a state court instead."

Under the antitrust laws, 15 U.S.C. §5, 25, additional defendants in conspiracy cases may be summoned whether or not they reside in the district only when the court finds "that the ends of justice require" that they be joined. In these cases the out-of-state defendant must be added because it is claimed that he acted in combination with the in-state defendant or defendants already before the court. The com-

The decision in *Fitzsimmons* v. *Barton*, 589 F.2d 330 (7th Cir. 1979), recognized that *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), "rejected the notion that Due Process limitations on jurisdiction arose from considerations of territorial sovereignty." 589 F.2d at 332. The court in *Fitzsimmons*, however, narrowly read *Shaffer* as relating only to the fairness of the exercise of power by a particular sovereign and not the burdens of litigating in a distant forum. *Id.* at 333. This is a tautology. The significant burden imposed by the exercise of extra-territorial jurisdiction by a particular sovereign and the burden which makes exercises of personal jurisdiction so unfair as to violate due process is the burden of litigating in a distant forum. If such a burden is unreasonably imposed, it creates a due process infirmity whether or not jurisdiction is extra-territorial.

Nor do the cases cited in *Fitzsimmons*, *id.* at 333 n.3, support the theory it employed. Of course, Congress can permit the process of federal courts to run throughout the nation. State court process does the same under long-arm statutes. The question is whether the exercise of jurisdiction in the particular case and under the particular statute is fundamentally fair. The statute and facts addressed in *Fitzsimmons* did not raise a fairness issue. *Id.* at 334-335 nn.6, 7. If the burdens imposed on the right to defend are to be considered in the due process equation, as they must, *Fitzsimmons* was decided on an incorrect theory.

There is no dispute that the United States may exercise sovereign authority over petitioners. The manner in which that authority may be exercised is limited by due process, which requires that our traditional notions of fair play and substantial justice be observed.

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bination in violation of the antitrust laws must, at least at one end, have been committed in the forum jursdiction pursuant to the agreement of the out-of-state defendants.

In securities cases, 15 U.S.C. §§77v(a), 78aa, the relevant statutes specifically limit the districts in which suit can be brought to the districts where the defendant is found, or is an inhabitant, or transacts business, or where the offer or sale of securities took place, if the defendant participated therein. In any such instance the demands of due process are met since the defendant would have "affiliating circumstances" which make it fair to require him to defend there. *See also* Appendix K (p. 51a to Petition for Certiorari).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Dated: New York, New York
April 17, 1979

Respectfully submitted,

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Nos. 77-1546 and 78-303

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM H. STAFFORD, JR., ET AL., PETITIONERS

v.

JOHN BRIGGS, ET AL.

WILLIAM F. COLBY, ET AL., PETITIONERS

v.

RODNEY D. DRIVER, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND FIRST CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND FIRST CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will address the question whether the venue provisions of 28 U.S.C. 1391(e) apply to actions against federal officers or employees for money damages.[1]

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[1] The petitions also present the question whether the Due Process Clause forbids a federal court to exercise personal jurisdiction over persons who do not have substantial "contacts" with the state in which the federal court sits. We do not discuss this matter at length because we agree with the courts of appeals that Section 1391(e) is not constitutionally infirm. See Stafford Pet. App. 14a-18a; Colby Pet. App. 18a-20a. Many federal statutes authorize nationwide jurisdiction. See, *e.g.*, 28 U.S.C. 1397, 2361 (interpleader); 15 U.S.C. 5, 25 (antitrust laws); 15 U.S.C. 78aa (securities laws). Other statutes allow federal administrative agencies, which sit only in the District of Columbia, to adjudicate the rights of persons anywhere in the nation. Petitioners' arguments would require at least some of these statutes to be declared invalid. But the courts of appeals properly held that *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), and similar cases hold only that the Due Process Clause requires certain minimum contacts between the defendant and the sovereign that has created the court. A sovereign cannot exercise coercive force over persons who have not, in some manner, subjected themselves to its authority. The United States, however, has an unquestioned right to exercise sovereign authority over petitioners. That it does so through one of its courts rather than another is of no concern under the analysis of *Shaffer*. See *Fitzsimmons* v. *Barton*, No. 78-1021 (7th Cir. Jan. 5, 1979), slip op. 5: "the 'fairness' standard imposed by *Shaffer* relates to the fairness of the exercise of power by a particular sovereign, not the fairness of imposing the burdens of litigating in a distant forum." This Court frequently has held that courts that sit only in the District of Columbia—such as the Court of Claims—can exercise nationwide jurisdiction. See *United States* v. *Union Pacific R.R.*, 98 U.S. 569, 603-604 (1878); *Mississippi Publishing Corp.* v. *Murphee*, 326 U.S. 438, 442 (1946). See also

INTEREST OF THE UNITED STATES

The United States is concerned that federal employees sued for damages because of acts that appear to have been performed within the scope of employment not be forced to defend their actions in inconvenient forums. Defending suits in such places burdens the United States in two ways.

First, with certain exceptions the Department of Justice either represents such employees through its own attorneys or pays private counsel to do so. See 28 C.F.R. 50.15 and 50.16. To the extent that litigation in inconvenient places increases the cost of that defense, the United States has a direct financial interest in the outcome of these cases.

Second, an employee who is forced to participate in litigation in places far removed from his official residence or from the place where the claim arose can devote less time and attention to the performance of his official duties while the litigation is in progress. As a defendant, he is subject to deposition and participation in other pre-trial matters where the court is located and must attend the trial itself. As the present cases demonstrate, litigation of this nature is lengthy (the complaints in these cases were filed in 1974 and 1975) and the incremental effect of an inconvenient forum is to detract

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South Carolina v. *Katzenbach*, 383 U.S. 301, 331-332 (1966). Because we conclude that 28 U.S.C. 1391(e) is not subject to substantial constitutional challenge, even if construed as the courts of appeals have construed it, we devote this brief to analysis of the proper interpretation of the statute.

from the employee's performance of present duties. Such suits may be particularly burdensome after the employee has left government employment; it may be difficult for him to take leave from his private affairs in order to defend suits scattered throughout the nation. The prospect of such suits therefore may make it more difficult for the United States to attract able persons into public service.

STATUTES INVOLVED

28 U.S.C. 1391 provides in relevant part:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.
>
> * * * * *
>
> (e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff

> resides if no real property is involved in the action. Additional persons may be joined as parties to any action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

28 U.S.C. 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT

A. STAFFORD

In 1972 William Stafford, then United States Attorney for the Northern District of Florida, Stuart Carrouth, Assistant United States Attorney, and Claude Meadow, an FBI agent, conducted grand jury proceedings in Florida. Respondents were subpoenaed to appear before the grand jury. At the request of respondents' counsel, the district judge responsible for the proceedings ordered Guy Goodwin, an attorney employed by the Department of Justice

who was assisting petitioners in their investigation, to take the witness stand and testify under oath. The district judge asked Goodwin whether there were any "agents or informants" of the government among the witnesses represented by counsel. Goodwin replied that there were not (Stafford Pet. App. 2a).

Respondents brought this suit in the United States District Court for the District of Columbia against petitioners and Goodwin,[2] alleging that Goodwin's testimony was false and that it was part of a conspiracy among petitioners to deprive respondents of statutory and constitutional rights. Each respondent sought $50,000 in compensatory damages and $100,000 in punitive damages from petitioners and Goodwin.

Petitioners and Goodwin requested transfer of the action to the United States District Court for the Northern District of Florida; petitioners also requested, in the alternative, dismissal of the action on the ground that venue was not properly laid in the District of Columbia (Stafford Pet. App. 3a). The district court denied the motion to transfer (*id.* at 23a-24a) but granted the motion to dismiss (*id.* at 25a-26a).[3] The court then entered a separate judg-

[2] Petitioners were served by certified mail in Florida; Goodwin was served personally in the District of Columbia (Stafford Pet. App. 3a).

[3] Goodwin (but not petitioners) moved to dismiss the complaint against him on grounds of prosecutorial immunity. The district court denied the motion (Stafford Pet. App. 20a-23a), and the court of appeals affirmed (*Briggs* v. *Goodwin*,

ment under Fed. R. Civ. P. 54(b) dismissing the case against petitioners (*id.* at 27a).

On respondents' appeal, the court of appeals reversed (Stafford Pet. App. 1a-19a).[4] It held that 28 U.S.C. 1391(e) permits damages actions against federal officials to be brought in any district in which any defendant resides. Venue was proper here, it held, because Goodwin was a resident of the District of Columbia (Stafford Pet. App. 5a-12a). The court also held that Section 1391(e), as so interpreted, is constitutional because there is no need that any defendant have any "contacts" with the place in which a particular federal court sits (Stafford Pet. App. 14a-18a).

B. COLBY

From 1953 until 1973 the Central Intelligence Agency (CIA) opened and photographed, at Kennedy Airport in New York, a portion of the mail travelling between the United States and the Soviet Union.[5] Petitioner Walters was appointed Deputy Director of Central Intelligence in May 1972, and

569 F.2d 10 (D.C. Cir. 1977), cert. denied, 437 U.S. 904 (1978)).

[4] Goodwin did not seek review of the district court's order denying his motion to transfer. Because he did not join the motion to dismiss, the court of appeals did not consider on this appeal any issue concerning Goodwin. See also note 3, *supra*.

[5] See generally Final Report of the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, S. Rep. No. 94-755, 94th Cong., 2d Sess. 559-677 (1976).

petitioner Colby was appointed Director of Central Intelligence in September 1973.

Respondents filed this action against petitioners and others[6] in the United States Court for the District of Rhode Island on behalf of themselves and others whose mail allegedly had been opened and read by CIA employees. Respondents alleged that the activities of petitioners and other defendants violated their constitutional rights, and they sought damages and declaratory and injunctive relief (Colby Pet. App. 2a). They contended that venue was proper in Rhode Island under 28 U.S.C. 1391(e) because one plaintiff lived there. Petitioners and other defendants were served by certified mail outside Rhode Island.

All of the defendants moved to dismiss the complaint for lack of personal jurisdiction, improper venue and insufficiency of process (Colby Pet. App. 22a). The district court denied the motion, holding that Section 1391(e) supplied both personal jurisdiction and venue (Colby Pet. App. 25a-33a), that it applied to damages actions against federal officials (*id.* at 33a-45a) and that it applied to persons who had left government service before the complaint was filed (*id.* at 46a-50a).[7] The district court then cer-

[6] See Colby Pet. 3 n.2.

[7] The district court also ruled on questions not germane to the issues presented in this Court. See Colby Pet. App. 51a-52a (specificity of allegations), 52a-53a (mootness), 54a-69a (purported class represented by named plaintiffs).

tified the case for an interlocutory appeal under 28 U.S.C. 1292(b) (Colby Pet. App. 53a, 70a-71a).

The court of appeals affirmed the denial of petitioners' motion to dismiss but reversed concerning the former employees (Colby Pet. App. 1a-20a).[8] It held that Section 1391(e) applies to damages actions against federal officials and employees in their individual capacities because they are within the literal language of the statute (Colby Pet. App. 6a-14a). The court also held that "to the same extent that § 1391(e) supplies venue, it supplies the mechanism to secure personal jurisdiction" (*id.* at 17a; footnote omitted) and that, so interpreted, Section 1391(e) is constitutional (*id.* at 18a-20a).

SUMMARY OF ARGUMENT

In *Schlanger* v. *Seamans*, 401 U.S. 487 (1971), this Court refused to read Section 1391(e) as broadly as its language would permit. The Court held it inapplicable to habeas corpus actions because they were not the type of "civil action" Congress had in mind when it enacted the statute.

[8] In reversing the district court's denial of the former employees' motion to dismiss, the court held that Section 1391(e) does not apply to defendants who, at the time the action is filed, "were not serving the government in the capacity in which they performed the acts on which their alleged liability is based" (Colby Pet. App. 6a; footnote omitted). This Court denied both respondents' petition for a writ of certiorari to review this ruling and the former employees' conditional cross-petition (Nos. 78-310 and 78-311, cert. denied, Jan. 16, 1979).

Congress likewise did not have damages actions against federal employees in mind when it enacted Section 1391(e). Federal officials generally were immune from liability for acts arising within the outer perimeter of their duties, and there was then no implied right of action for violations of the Constitution. Nearly every damages action against a federal employee was based on an alleged breach of common law duties, and there was no venue problem in such suits.

Section 1391(e) was drafted and passed against that background, as an adjunct to what is now 28 U.S.C. 1361, which gave district courts throughout the country jurisdiction to grant mandamus relief, a jurisdiction that previously had been limited to the district court for the District of Columbia. The hearings held on the predecessor of the bill that became Sections 1361 and 1391(e), and the three committee reports that discuss the purpose and scope of that bill, demonstrate that Section 1391(e) was intended to eliminate the problem that indispensable parties usually lived outside the plaintiff's district. The bill gave broader venue in actions for mandamus or similar judicial relief from administrative action, and thus permitted such suits nationwide even when policymaking officials could be found only in the District of Columbia. The language "under color of legal authority" was inserted in Section 1391(e) because such suits often named the official individually in order to circumvent the sovereign immunity defense, and Congress wanted to be sure that relief would not be denied because the plaintiff named the defendant

in his individual capacity. But Congress had no further purpose in enacting the statute, and during the hearings members of Congress repeatedly stated that the statute would not apply to damages actions. Such actions never had raised a venue problem comparable to the problem in mandamus suits, and thus there was no need for new or unusual venue rules.

Section 1391(e) certainly would be an unusual venue rule if applied to damages actions. The principal rules of venue in such actions have been geared to the convenience of the defendant and, in more recent years, to the place where the claim arose. Exceptions to this policy are few, and this Court has properly refused to recognize them where Congress has not clearly announced its intention to do so. It has not done so here.

ARGUMENT

SECTION 1391(e) DOES NOT APPLY TO ACTIONS SEEKING DAMAGES FROM FEDERAL EMPLOYEES

The basic rule of venue in federal suits seeking damages from individual persons for violations of federal laws is that "[the] action * * * may be brought only in the judicial district where all defendants reside, or in which the claim arose" (28 U.S.C. 1391(b)). The application of that rule to these cases would require a decision in favor of petitioners. Because in neither case do all of the defendants reside in the same district, both cases could have been brought only where "the claim arose." In *Stafford* the proper court would be the Northern District of Florida; in *Colby*

the proper court would be the Eastern District of New York (or, arguably, the Eastern District of Virginia, which contains the headquarters of the CIA).

The courts of appeals held, however, that 28 U.S.C. 1391(e) creates a different rule for federal employees. If the statute is read broadly there is no escaping that conclusion. Section 1391(e) creates a special venue rule for civil actions in which "a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority * * *." The parties agree that if Section 1391(e) applies to suits seeking damages from the pockets of federal employees, and if it is constitutional (see note 1, *supra*), then these cases properly could be brought in the District of Columbia and Rhode Island instead of Florida and New York.

We argue in the bulk of this brief that the legislative history of Section 1391(e) and practical considerations counsel against a broad reading of the statute. Indeed, both courts of appeals have declined to give the statute its broadest literal reading: both have exempted from suit under Section 1391(e) persons who had left the government or were serving in a different capacity by the time suit was filed. Colby Pet. App. 4a-6a, cert. denied on this issue, Nos. 78-310 and 78-311 (Jan. 16, 1979); *Lamont* v. *Haig*, No. 75-2006 (D.C. Cir. Oct. 16, 1978). This treatment of the statute cannot easily be justified by its language: former officials, no less than current officials, are officers or employees sued because of their

acts under color of law.[9] Both courts, however, came to this conclusion because of their interpretation of the legislative history (Colby Pet. App. 4a-5a; *Lamont*, *supra*, slip op. 11-14), which, both courts concluded, did not contain a sufficient indication of congressional intent to abrogate the limits of Section 1391(b) in damages actions simply because the defendant once had some connection to the federal government.

Legislative history and practical considerations, then, have played a role in the understanding of Section 1391(e) despite its apparent breadth.[10] In approaching Section 1391(e) in this fashion, the courts of appeals were following a path that was blazed by this Court, which already has held that Section 1391(e) should not be given a literal reading. *Schlanger*

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[9] Both courts relied in part on the statute's reference to a person who "is" a federal employee. This meant, they said, that the statute does not apply to a person who "was" a federal employee. This construction is unsatisfactory. The reliance on the present tense could not explain the holding that Section 1391(e) does not apply to a person who "is" a federal employee at the time suit is filed, but who is serving in a job other than the one he held at the time of the allegedly unlawful acts. And the courts did not discuss the possibility that the present tense applies only to the defendant's official capacity at the time of the acts complained of, rather than his capacity at the time suit was filed.

[10] See also *United States* v. *Culbert*, 435 U.S. 371, 374 n.4 (1978); *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976); and *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543-544 (1940), all concluding that the legislative history of a statute is pertinent no matter how plain the statute's words may appear to be.

v. *Seamans*, 401 U.S. 487 (1971). We turn to that case.

A. This Court Has Declined To Read Section 1391(e) As Broadly As Its Language Would Permit

In *Schlanger* a serviceman on detached duty to attend college in Arizona brought a habeas corpus action in Arizona against the Secretary of the Air Force and the plaintiff's commanding officer, who was in Georgia. The district court dismissed the petition for lack of jurisdiction because "neither the Secretary of the Air Force nor petitioner's commanding officer is within the territorial jurisdiction of this court or within reach of this Court's process." *Schlanger* v. *Seamans*, No. 69-381 Phx. (D. Ariz. Feb. 10, 1970). The court of appeals affirmed. *Schlanger* v. *Seamans*, No. 25,525 (9th Cir. May 20, 1970). The serviceman petitioned for a writ of certiorari, contending that under *Ahrens* v. *Clark*, 335 U.S. 188 (1948), he was "precluded from filing the action in any district *except* Arizona" and that the district court had personal jurisdiction over respondents because they "are amenable to process under 28 U.S.C. 1391(e)." *Schlanger* v. *Seamans*, No. 5481, October Term, 1970, Pet. 11. After the petition was granted, petitioner argued that the fact that his commanding officer and the Secretary were not in Arizona did not deprive the district court of jurisdiction over them in light of Section 1391(e). Br. 16-18. Petitioner argued that his Arizona suit against federal officials who resided in Georgia and the District of Columbia was "precisely the situation" that Section 1391(e) had been

meant to address (Br. at 18), and he urged that "[t]here are compelling reasons for this Court to apply the intentionally broad language of 28 U.S.C. § 1391(e) to actions such as the one at bar" (*id.* at 19). The federal respondents answered that "the well established principles of habeas corpus jurisdiction should [not] be abandoned wholesale, which would be the result of a blind application of the literal language of Section 1391(e)." Resp. Br. 34.

Squarely faced with the question whether Section 1391(e) applied, this Court concluded that "the absence of [petitioner's] custodian is fatal to the jurisdiction of the Arizona District Court." *Schlanger* v. *Seamans*, *supra*, 401 U.S. at 491. Section 1391(e), the Court held, did not require a different result. Without disputing the reach of the statute's language, the Court stated that "the legislative history of that section is barren of any indication that Congress extended habeas corpus jurisdiction. That section was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia. Though habeas corpus is technically 'civil,' it is not automatically subject to all the rules governing ordinary civil actions." 401 U.S. at 490 n.4 (citations omitted).[11] The Court thus declined

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[11] Other cases also look behind the language of a venue statute to conclude that it should not be applied as broadly as its language would permit. In *In re Hohorst*, 150 U.S. 653, 661 (1893), the Court held that when Congress amended a statute providing venue in an action "against an inhabitant of the United States" by substituting the phrase "against any person," it did not intend to broaden the statute to include actions

to give Section 1391(e) a literal reading, because such a broad reading was neither required by the legislative history nor consistent with other sound considerations regarding appropriate venue. This approach to Section 1391(e) supports our position here.

B. The Legislative History Of Section 1391(e) Demonstrates That Congress Did Not Envision Its Application To Damages Suits

1. *Legal rules about damages actions when Section 1391(e) was being considered*

The legislative history of Section 1391(e) demonstrates that Congress never envisioned that it could be applied to damages actions against federal officers or employees.[12] A full understanding of that legislative history requires an appreciation of the state of the law when the bill containing Section 1391(e) was

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against aliens. The Court reaffirmed this reasoning in *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U.S. 706 (1972), which held that, notwithstanding the provision of 28 U.S.C. 1400(b) that patent infringement suits could be brought only in the district where the defendant resides or where he has committed acts of infringement and maintains a regular place of business, a patent infringement suit against an alien could be brought in any district under 28 U.S.C. 1391(d) ("an alien may be sued in any district"). See also *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976) (national banks may be sued only where they are located, despite the nationwide venue provisions of the securities laws).

[12] As a general matter, federal venue questions turn on what "most nearly approximates the intent of Congress * * *." *Denver & R.G.W. R.R.* v. *Brotherhood of Railroad Trainmen*, 387 U.S. 556, 562 (1967). See also *Pure Oil Co.* v. *Suarez*, 384 U.S. 202, 207 (1966).

first introduced in 1960, debated, and finally enacted in 1962.

a. *Federal officers were immune from suits arising out of acts taken within the outer limits of their authority*

In 1896 this Court held that the Postmaster General was immune from suit for conduct "not unauthorized by law, nor beyond the scope of his official duties" even though the plaintiff alleged that the Postmaster General had acted maliciously. *Spalding* v. *Vilas*, 161 U.S. 483, 493 (1896). The Court relied on cases holding judges absolutely immune from suit for acts done in their official capacity and concluded that "the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law." *Id.* at 498. If the official's acts are not "manifestly or palpably beyond his authority," the Court stated (*ibid.*), "his conduct cannot be made the foundation of a suit against him for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects" the plaintiff. *Id.* at 499. If the "acts did not exceed his authority, nor pass the line of his duty * * * [t]he motive that impelled him to do that of which the plaintiff complains is * * * wholly immaterial." *Ibid.*

In 1926, in a case remarkably similar to *Stafford*, the Second Circuit held that a federal prosecutor could not be sued for malicious prosecution. The complaint in that case (*Yaselli* v. *Goff*, 12 F.2d 396) alleged that the prosecutor provided a grand jury with fictitious information, with the malicious intent to obtain an indictment and procure the arrest of the plaintiff (12 F.2d at 397). At the criminal trial, the court dismissed the case for want of evidence (*id.* at 398-399). The Second Circuit concluded that the complaint did not state a claim on which relief could be granted, because prosecutors enjoy the same immunity as judges (*id.* at 404-407). After receiving briefs and hearing oral arguments, this Court affirmed without opinion. 275 U.S. 503 (1927). Prosecutorial immunity is still in force. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Butz* v. *Economou*, No. 76-709 (June 29, 1978), slip op. 29-38.

In 1959 the Court was called on to decide whether the absolute immunity of *Spalding* extended to officers of less than Cabinet rank. In *Barr* v. *Matteo*, 360 U.S. 564 (1959),[13] the plaintiffs brought suit for libel under the laws of the District of Columbia, alleging that Barr, then acting director of an administrative agency, had libelled them, and maliciously so, in a press release he issued in response to congressional criticism of the agency's actions. Barr claimed an

[13] There was no opinion for the Court in *Barr*. Four Justices joined a plurality opinion, and Mr. Justice Black filed a concurring opinion. The plurality opinion stated the governing rule, however. See *Howard* v. *Lyons*, 360 U.S. 593 (1959).

absolute immunity from suit, and this Court held that it is "in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation * * *" (*id.* at 572, quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d. Cir. 1949), cert. denied, 339 U.S. 949 (1950)). The critical question was not whether Barr was required to issue the press release, but simply whether he had done so "in the line of duty * * * for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority." *Barr* v. *Mateo*, *supra*, 360 U.S. at 575. The Court concluded that the fact that Barr's press release "was within the outer perimeter of [his] line of duty is enough to render the privilege [of absolute immunity from suit] applicable, despite the allegations of malice in the complaint * * *" (*ibid.*).

b. *In most cases there was no right of action in federal court*

Barr did not deal with the question of privilege that "would have been presented had the officer ignored an express statutory or constitutional limitation on his authority" and thus it did not "purport to depart from the general rule, which long prevailed, that a federal official may not with impunity ignore the limitations which the controlling law has placed on his powers." *Butz* v. *Economou*, *supra*, slip op. 10. *Barr*, *Yaselli* and *Spalding* dealt only with

immunities, which did not cover every possible wrong. But the law of immunities was only half the story: immunities are irrelevant unless the plaintiff has a right of action to begin with. Rights of action against federal officers have been rare. No federal statute authorizes suit in federal court to collect damages from federal officers who violate the Constitution or federal law. In 1960 to 1962, then, suits for damages against federal officials would have been all but impossible, not simply because of immunities but because there was no implied federal right of action for violations of constitutional rights. Moreover, the view prevailing at that time was that a federal right of action even for a statutory violation was entirely within the control of Congress.

In *Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963), this Court, in rejecting the contention that a person served with a subpoena that allegedly had been issued in violation of a federal statute had a right of action for damages, summarized the problems facing prospective plaintiffs in damages actions. "Congress has not created a cause of action for abuse of the subpoena power by a federal officer," said the Court (*id.* at 651), and "it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co.* v. *Tompkins*, 304 U.S. 64. The instances where we have created federal common law are few and restricted." And, continued the Court, "it is difficult for us to see how the present statute, which only grants power to issue subpoenas, implies a cause of action for abuse of that power. Congress has not

* * * left to federal courts the creation of a federal common law for abuse of process." 373 U.S. at 651-652. "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. * * * Congress could, of course, provide otherwise, but it has not done so. * * * We conclude, therefore, that it is not for us to fill any *hiatus* Congress has left in this area." *Id.* at 652.

Not until 1971, nearly a decade after Section 1391 (e) was enacted, did this Court hold that a person whose constitutional rights had been violated might have a right of action in federal court for damages against the offending officials. *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). The question had been reserved in *Bell* v. *Hood*, 327 U.S. 678 (1946), and, as this Court stated last Term, "*Bivens* established that compensable injury to a constitutionally protected interest could be vindicated by a suit for damages invoking the general federal question jurisdiction of the federal courts * * *." *Butz* v. *Economou*, *supra*, slip op. 7 (footnote omitted).

Although in 1960 a person had no federal right of action for damages against federal officials for violations of federal statutes or the Constitution, damages suits against federal officers or employees for alleged violations of state common law duties were fairly common, as *Wheeldin* v. *Wheeler*, *supra*, had recognized. These actions, based on state tort law, could be brought in federal courts if the parties were

of diverse citizenship,[14] or could be removed to federal court from a state court.[15] Federal courts entertained actions for damages in a variety of contexts, including claims that defendant federal officials had slandered the plaintiff, falsely imprisoned him, conspired against him or damaged his business relationships.[16]

2. *Section 1391(e) was designed to provide venue in suits seeking to compel an officer or employee to perform a duty*

The law prevailing in the early 1960s, which we have summarized above, meant that few persons had

[14] See 28 U.S.C. 1332(a). Venue in diversity actions is governed by 28 U.S.C. 1391(a), which provides that such cases may be brought "only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose." The ability of plaintiffs to bring suit where the plaintiffs reside is restricted by Fed. R. Civ. P. 4(f), setting territorial limits on service of process.

[15] See 28 U.S.C. 1442.

[16] See, *e.g.*, *Sauber* v. *Gliedman*, 283 F.2d 941 (7th Cir. 1960), cert. denied, 366 U.S. 906 (1961) (damages action brought by indicted IRS official against special assistant to the Attorney General for making allegedly defamatory statements to the press); *O'Campo* v. *Hardisty*, 262 F.2d 621 (9th Cir. 1958) (damages action against IRS officials for alleged conspiracy to destroy plaintiff's business); *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950) (damages action against Department of Justice officials in New York for alleged false imprisonment at Ellis Island); *Norton* v. *McShane*, 332 F.2d 855 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965) (action against federal marshals for assault and battery and conspiracy); *DeBusk* v. *Harvin*, 212 F.2d 143, 147 (5th Cir. 1954) (damages suit by former government employee against supervisors, alleging conspiracy).

federal rights of action for violations of constitutional or statutory rules.[17] Even when there was a right of action created by state law (in which case there might be diversity or removal jurisdiction) or implied by a federal court (in which case there would be jurisdiction under 28 U.S.C. 1331), the federal employee usually could abort the suit at the outset by relying on official immunity.[18] Whether the suit was brought under diversity or under federal question jurisdiction, venue was proper where the defendants could be found; in diversity cases venue also was proper

[17] The scope of federal rights of action still is unclear. We have argued (*Carlson* v. *Green*, petition for cert. pending, No. 78-1261) that there is no implied right of action against federal officials when recovery could be sought from the United States under the Federal Tort Claims Act. If the Court agrees with this analysis, then the *Colby* suit cannot be maintained, for recovery can be had under the Tort Claims Act (see *Birnbaum* v. *United States*, 588 F.2d 319 (2d Cir. 1978). Analysis of *Stafford* is more difficult, because Goodwin's alleged perjury may be a form of "deceit" that is outside the scope of the FTCA (28 U.S.C. 2680(h)), and the activities of Stafford, Carrouth and Meadow, if actionable at all, would be a form of "malicious prosecution" that was outside the scope of the FTCA until 1974 (Pub. L. No. 93-253, 88 Stat. 50). We need not pursue the matter, however; it is enough to note that damages actions of the sort at issue here are problematic even today, and they would not have been within the contemplation of Congress in 1960 and 1962.

[18] Damages actions were sufficiently rare that this case is controlled by the principle that venue statutes should not be "inflexibl[y]" applied in a way that dictates "the choice of an inconvenient forum * * * in a class of cases which could not have been foreseen at the time" the statute was enacted. *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 500 (1973).

where all plaintiffs resided. 28 U.S.C. (1958 ed.) 1391(a) and (b).[19] And although sometimes that forum was inconvenient to one party or another, cases could be transferred under 28 U.S.C. 1404(a). Venue simply was not a problem in such cases, or at least no one complained about it. People did, however, complain about venue in cases to compel federal officers to carry out duties imposed on them by law, and these complaints led to the enactment of Section 1391(e).

a. *The 1960 bills in the House*

i. The anomalous scope of mandamus jurisdiction in 1960

At common law, a court could issue a writ of mandamus to compel a government official to perform his duty. See, *e.g.*, *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 177-178 (1925).[20] In *McIntire* v. *Wood*, 11 U.S. (7 Cranch) 503 (1813), and *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 617-621 (1838), this Court held that Congress had

[19] The statute was amended in 1966 to permit both diversity and federal question cases to be brought in the district in which the claim arose. Pub. L. No. 89-714, Section 1, 80 Stat. 1111.

[20] Fed. R. Civ. P. 81(b) abolished the writ of mandamus but provided that "[r]elief heretofore available by mandamus * * * may be obtained by appropriate action or by appropriate motion under the practice prescribed in these Rules." For convenience, we will refer to a post-Rules "action in the nature of mandamus" or "relief in the nature of mandamus" as simply an action for mandamus, or mandamus relief.

not granted the federal courts jurisdiction to issue writs of mandamus, and that the only court that had such jurisdiction was what is now the United States District Court for the District of Columbia, which obtained jurisdiction from the law of Maryland on cession in 1801.[21]

For more than 150 years after *Kendall*, Congress did nothing to provide mandamus jurisdiction to courts outside the District of Columbia, and thus litigants who sought mandamus were required to press their cause in that court or none at all. Litigants often sought to avoid this obstacle by bringing suit nearer to home for conventional injunctive or declaratory relief. But there they foundered on another barrier: such actions, though ostensibly against a subordinate federal official who could be found locally, frequently were dismissed because the defendant's superior officer (usually a Cabinet officer or agency head, and usually stationed in the District of Columbia) was an indispensable party, and a local federal court had no means of obtaining jurisdiction over him. See *Williams* v. *Fanning*, 332 U.S. 490 (1947) (discussing cases); *Stroud* v. *Benson*, 254 F.2d 448 (4th Cir. 1958); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review*, 75 Harv.

[21] Federal courts did have authority under the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 82 to issue any writ, including mandamus, "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." See *McIntire* v. *Wood*, *supra*, 11 U.S. (7 Cranch) at 504; 28 U.S.C. 1651. Authority under this statute, however, pertained primarily to appellate control of lower courts' proceedings.

L. Rev. 1479, 1493-1499 (1962). As one advocate of reform concluded: "In these categories of cases petitioner's suit often is dismissed not because of a reasoned legislative or judicial determination that judicial review is inappropriate in the circumstances but for reasons that have nothing to do with the propriety or lack thereof of judicial review of the administrative action in question." *Id.* at 1483.

In 1960 Congress moved to correct the "historic accident" that had limited judicial review of many official actions to the District of Columbia. H.R. Rep. No. 1936, 86th Cong., 2d Sess. 2 (1960). The House Judiciary Committee considered a bill—H.R. 10089, 86th Cong., 2d Sess. (1960)—that would have permitted a person to bring a "civil action * * * against an officer of the United States in his official capacity * * * in any judicial district * * * where a plaintiff in the action resides." [22]

The Department of Justice, commenting on the bill, pointed out an omission that rendered the bill useless. Although the bill permitted a plaintiff to bring suit against an officer in his official capacity in the district where the plaintiff resided, it neglected to give the district courts jurisdiction to hear such suits. "H.R. 10089 relates only to venue," said the Department of Justice, "and this bill would not confer mandamus jurisdiction on courts other than the district court for the District of Columbia." H.R. Rep. No.

[22] An identical bill had been introduced in 1958, but no action was taken on it. H.R. 10892, 85th Cong., 2d Sess. (1958).

1936, *supra*, at 6. The Department of Justice also pointed out that "[m]ost actions * * * brought against a public official" sought either to enjoin him from taking action that the plaintiff claimed was illegal or "(2) to seek damages from him personally for actions taken ostensibly in the course of his official duty but which the plaintiff claims are in excess of his official authority." But both types of suits "are against the official in his individual capacity" and thus beyond the scope of the Committee's concern (*ibid.*).

ii. The hearings on the bill

After receiving these comments a subcommittee held hearings on the bill. These hearings demonstrate that the bill was intended to apply only to judicial review of administrative action, and not to provide venue in damages actions against government officials. *Hearings on H.R. 10089 before Subcomm. No. 4 of the House Comm. on the Judiciary*, 86th Cong., 2d Sess., (May 26 and June 2, 1960).[23]

Representative Budge of Idaho, the author of H.R. 10089, testified that the "problem" that the bill was designed to cure occurred when "a dispute arises between a citizen of my State and an agency of the United States Government" and the district judge in Idaho "concludes that he is without jurisdiction in the case and that he must dismiss the suit, and the case then has to be filed in the District of Columbia." *Hearings, supra*, at 2-3. Murray Drabkin, the

[23] The transcripts of these hearings are unpublished. We are lodging a certified copy with the Clerk of this Court.

committee's counsel, asked Representative Budge: "In particular, what kinds of actions or what kinds of problems have arisen in Idaho to precipitate this kind of solution?" Representative Budge replied: "As it is now, there is no opportunity for a judicial review of the action of any decision that is made by a Federal officer in charge out there, no matter how arbitrary or capricious, because it is too expensive to come back here to litigate it." *Hearings*, *supra*, at 19-20.

Donald MacGuineas, testifying on behalf of the Department of Justice, reiterated the Department's view that the bill neglected to provide jurisdiction to the district courts. He said: "I think the Committee ought to bear in mind, it apparently assumed that this bill was intended to cover only a mandamus action." *Id.* at 31-32. Drabkin corrected him: "I think what this bill is concerned with doing is dealing with mandamus and also dealing with petitions for review which may not properly be brought now because of some venue defect." *Id.* at 32.[24]

[24] Representative Dowdy stated at this point: "I asked to be sure it was not limited to that." *Ibid.* The court of appeals in *Colby* assumed that Rep. Dowdy was replying to Mr. Drabkin and inferred that Rep. Dowdy's statement that the bill was not to be limited to "that" referred to "mandamus and also * * * petitions for review." The court concluded that Rep. Dowdy believed that the bill covered damages actions. See Colby Pet. App. 9a-10a. This is a misreading of Rep. Dowdy's position. As he later stated: "I don't understand that we have in consideration suits for money damages. That would be maybe where a person is being sued as an individual. * * * They would not be covered by this." *Hearings*, *supra*, at 87.

Thus, when Rep. Dowdy stated: "I asked to be sure it was not limited to that," he was apparently answering Mr. MacGuineas's statement of the bill's scope, not to Mr. Drabkin's.

But if the bill was intended to cover administrative review, not just mandamus, it was too narrowly worded, as MacGuineas explained: "You may get into a very expanded and complicated area of law if this bill is intended not to be limited to mandamus but to [include] injunction actions. For instance, where the citizen seeks to enjoin the Government official from taking certain actions * * * that is not a suit against the official in his official capacity. It is then a suit against him in his individual capacity." *Hearings*, *supra*, at 32; see also *id.* at 33-34.[25]

In response to this problem the bill was amended to add the words "under color of legal authority." The amendment was suggested when the subcommittee reconvened the following week. Representative Poff asked Mr. MacGuineas (*id.* at 54):

> Mr. Poff. Wouldn't you say the author's objective is to give a citizen who has a legitimate complaint against his Government the right to sue his Government at the place where the wrong was committed?
>
> Mr. MacGuineas. The difficulty, if I may say so, Congressman, with your statement, is you speak of the right to sue his Government. Now that proposition in itself raises very difficult and complicated legal questions which I touched upon at my appearance last week.
>
> You must first decide whether a particular suit is actually a suit against the man in his official capacity or whether it i[s] a suit against

[25] See also pages 38-41, *infra*.

> the Government officer in his individual capacity. If it is the latter, it is not in any sense a suit against the Government.
>
> Mr. Poff. We are talking about technicalities * * *.

Mr. Drabkin, the committee's counsel, asked: "Mr. MacGuineas, isn't really the important question in the kind of case you raised whether or not it is in the performance of the official's duty? * * * [I]t is the intention of the author that the Government no longer should be able to retreat behind this artificial concept of individual action which has grown up to evade the sovereign immunity doctrine." *Hearings, supra*, at 57. Mr. Drabkin continued, "Suppose in order to take care of a body of law which seems to say that when a government official does something wrong he is acting in his individual capacity, we added the following language—'acting in his official capacity or under color of legal authority'." *Id.* at 61.

MacGuineas responded, with what must now be recognized as a good deal of prescience, that such language might later be interpreted to cover a damages action against a government official—slander, for example—and thus would raise "serious policy questions" by allowing a government official to be sued in the plaintiff's home district while a private defendant in an analogous action could be sued only in the district of his residence. *Id.* at 62-63. The chairman and the senior member of the subcommittee—two of the four members present—agreed (*id.* at 63):

> Mr. Forrester. I am inclined to think there is something to that.
>
> Mr. Poff. There is.

When Judge Maris, representing the Judicial Conference of the United States, testified, he and Representative Poff agreed that the situation to which MacGuineas had referred was a "legitimate problem" (*Hearings, supra*, at 85), and that "injustice" could be avoided only if such suits were limited to the district where the right of action arose. As Judge Maris concluded: "That is the normal procedure in the law. That is what ordinarily happens in the ordinary law suit." *Id.* at 86.

To eliminate the phrase "under color of authority," however, would have revived the problem that that phrase was intended to solve; the bill would not have reached suits for injunctive relief against a government official, because such suits were brought against him in his individual capacity to avoid the defense of sovereign immunity. See pages 38-41, *infra*. Representative Poff therefore stated that the "under color" phrase should be kept, but on the understanding that the statute would not apply to individual actions against government officials:

> Mr. Poff. If we agree that no serious injustice would be worked upon the defendant who was ultimately found to have been acting outside the scope of his employment, if we confined the venue to the place where the cause of action arose or where the property was situated, then don't you think it would be advisable to add after the word "capacity" in the revised draft, the words "or under color of legal authority?"

Hearings, supra, at 91-92. Judge Maris replied:

> I would be very happy to see that. I think that would tend to put at rest this fictional doctrine, which would be a good thing to bury that very deep underground if we could and get right down to what is really the fact—reviewing official action. That is what we are doing. We just have our tongues in our cheeks because of this ancient doctrine of sovereign immunity * * *.
>
> * * * * *
>
> That is what it all amounts to, but I think you have come around to face it squarely now and say you shall have that right directly and not talk about a fiction or subterfuge.

Judge Maris later agreed with Representative Whitener that "'color of authority' would [not] in any way broaden the area of the law suit." *Id.* at 96.

Representative Dowdy—the fourth member—also concluded that the statute would not apply to damages actions (*id.* at 87):

> Mr. Dowdy. Speaking to the point you were talking about, I don't understand that we have in consideration suits for money damages. That would be maybe where a person is being sued as an individual.
>
> Judge Maris. * * * [O]rdinarily I do not think suits for money damages would be involved.
>
> Mr. Dowdy. They would not be covered by this.

Representative Budge, the author of the bill, closed the hearings by testifying: "We always get off into

> these slander type actions which is not what I am seeking at all. * * * All I am seeking to do is to have the review of their official actions take place in the United States District Court where the determination was made." *Hearings, supra*, at 102. No member of the subcommittee took issue with that statement of the scope of the bill, nor did any member of Congress do so afterwards.

iii. The redrafted bill and the committee report

Following these hearings, the House Subcommittee redrafted H.R. 10089. The new bill—H.R. 12622, 86th Cong., 2d Sess. (1960)—contained two sections. Section 1 supplied the jurisdictional grant that was missing from H.R. 10089. This section provided: "The district courts shall have original jurisdiction of any action to compel an officer or employee of the United States or any agency thereof to perform his duty." H.R. Rep. No. 1936, *supra*, at 9. Section 2—which as later amended became 28 U.S.C. 1391(e)—provided venue, stating in pertinent part: "A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides, or in which the cause of action arose, or in which any property involved in the action is situated." Section 2 also provided for service of process by registered mail on extraterritorial defendants.

The revised language of H.R. 12622, whatever its ambiguities, is consistent with the expressed intent of all four members of the subcommittee that the bill was not to be read as applying to actions against federal officials in their truly individual capacities, that is, actions for damages. The Committee knew from the Department of Justice's letter, and from the discussion at the hearings, that both suits against an official for damages and suits for injunctive relief were considered to be suits against the official in his "individual capacity," although for different reasons. In the former case, the officer was sued individually because he would be liable personally. In the latter case, he was sued individually because a suit against the government would be barred by sovereign immunity. Therefore, the revised bill did not provide venue for suits against an official "in his individual capacity." The Committee retained the "under color of authority" terminology, so that one kind of "individual capacity" suit—the kind used to avoid sovereign immunity in some actions—would be covered. This made it clear that "[t]he purpose of this bill is to make it possible to bring actions against Government officials and agencies in U.S. district court outside of the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." H.R. Rep. No. 1936, *supra*, at 1.

"This bill," the Committee continued, "is not intended to give access to the Federal courts to an action which cannot now be brought against a Federal

official in the U.S. District Court for the District of Columbia." *Id.* at 2; see *Schlanger* v. *Seamans*, *supra*, 401 U.S. at 490 n.4. This language also demonstrates that suits for damages against federal officials are not covered by the bill; as we have shown (pages 21-24, *supra*), such suits were brought outside the District of Columbia when they could be brought at all. As two distinguished commentators summarized the situation, Section 1391(e) "disposed of the indispensable superior problem, not by making the superior dispensable, but by liberalizing venue and service-of-process requirements to permit the plaintiff to join the superior in the action in the field against the subordinate." Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 310 (1967). It did that, and no more.

The House Judiciary Committee's discussion of Section 2 also supports the construction of the bill that we urge here. The Committee pointed out the "historic accident" that had limited mandamus jurisdiction to the District of Columbia. H.R. Rep. No. 1936, *supra*, at 2. Requiring a person to travel to that court for mandamus relief was, in the Committee's view, "an unfair imposition upon citizens who seek no more than lawful treatment from their Government." *Ibid.* Thus, Section 1 allowed every district court to exercise mandamus jurisdiction, and "Section 2," the Committee stated, "is the venue section of the bill. Its purpose is similar to that of Section 1. It is designed to permit an action which is

essentially against the United States [26] to be brought locally rather than requiring that it be brought in the District of Columbia simply because Washington is the official residence of the officer or agency sued." H.R. Rep. No. 1936, *supra*, at 2.

The Committee's report went on to conclude that "the current state of the law * * * is contrary to the sound and equitable administration of justice." *Id.* at 3. Because the actions covered by the bill "are in essence against the United States," the United States Attorney in the local district could defend them at no inconvenience to the government. On the other hand, the citizen "aggrieved by the workings of Government" who lives thousands of miles from Washington would be severely inconvenienced by the requirement that he bring suit there. *Ibid.*

Even beyond considerations of convenience, the Committee went on, broadening venue would serve the ends of "efficient judicial administration" because "these proceedings involve problems which are recurrent but peculiar to certain areas such as water rights, grazing land permits, and mineral rights. These are problems with which judges in those areas are familiar and which they can handle expeditiously and intelligently." *Ibid.* Furthermore, the broadened venue provisions of the bill would alleviate

[26] The Committee apparently chose the words "an action which is essentially against the United States" rather than simply a "mandamus action" because the Department of Justice had advised the Committee that actions essentially against the United States included those for a mandatory injunction as well as for mandamus (page 27, *supra*).

court congestion in the District Court for the District of Columbia and thus allow the prompt dispensation of justice by courts with less crowded dockets. H.R. Rep. No. 1936, *supra*, at 3.

The Committee stated that Section 2 of the bill was designed "[t]o achieve these results." *Ibid.* "By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391 (e) applicable" to two types of cases. *Id.* at 3-4. First, said the Committee, are "those cases where an action may be brought against an officer or employee in his official capacity." *Id.* at 4. Second,

> those cases where the action is *nominally* brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. *Such actions are also in essence against the United States* but are brought against the officer or employee as [an] individual only to circumvent what remains of the doctrine of sovereign immunity. The considerations of policy which demand that an action against an official be brought locally rather than in the District of Columbia require similar venue provisions where *the action is based upon the fiction that the officer is acting as an individual.* There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned.

Id. at 3-4 (emphasis added).

iv. The distinction between suits against defendants in an individual capacity and those in an official capacity

Damages actions do not fall within either category discussed by the report. They seek money from the pockets of the defendants, not from the Treasury; they seek relief from persons as individuals, not as officials. They are not "in essence against the United States" because the United States does not pay the judgments. They are not based on a "fiction" of any sort.

Because the Committee drew a distinction between suits against an individual and those "in essence against the United States," it is important to understand that distinction in the way the Committee must have understood it. We have discussed at pages 28-33, *supra*, the understanding of the subcommittee members. The principal case articulating the distinction—*Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949)—also sheds light on what Congress understood. A private corporation sued the Administrator of the War Assets Administration, alleging that the Administrator had breached a contract to sell coal to the corporation and seeking both an injunction to prohibit him from delivering the coal to anyone else and a declaration that the sale to the plaintiff was valid. The district court dismissed the complaint because the suit was in essence against the United States and

thus barred by sovereign immunity.[27] The court of appeals reversed, but this Court upheld the district court.

The Court noted at the outset that:

> It was not alleged that the contract for the sale of coal was a contract with the officer personally. The basis of the action, on the contrary, was that a contract had been entered into with the United States. Nor was it claimed that the Administrator had any personal interest in this coal or, indeed, that he himself had taken any wrongful action. The complaint was directed against him because of his official function as chief of the War Assets Administration * * * [T]he existence of a right to sue the officer is not the issue in this case. The issue here is whether this particular suit is not also, in effect, a suit against the sovereign. If it is, it must fail, whether or not the officer might otherwise be suable.

337 U.S. at 686-687 (footnotes omitted). The Court held that, in deciding whether a suit nominally against the officer is in reality a suit against the sovereign, the "crucial question" is not who is named as defendant but "whether the relief sought * * * is relief against the soverign." *Id.* at 687. There is "no jurisdictional difficulty" presented by the sovereign's immunity when the suit seeks personal damages from the officer, for "[t]he judgment sought will not re-

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[27] In 1976 Congress abolished the defense of sovereign immunity in injunctive actions but retained the defense in actions for damages. See 5 U.S.C. 702; *Jaffee* v. *United States*, No. 78-2041 (3d Cir. Feb. 9, 1979), slip op. 10-14.

quire action by the sovereign or disturb the sovereign's property." *Ibid.* The difficulty arises when the suit seeks equitable relief, such as an injunction or specific performance, for "[i]n each such case the compulsion * * * may be compulsion against the sovereign, although nominally directed against the individual officer." 337 U.S. at 688.

Turning to the nature of the requested relief, the Court stated: "The relief sought in this case was not the payment of damages by the individual defendant. To the contrary, it was asked that the Court order the War Assets Administrator, his agents, assistants, deputies and employees and all persons acting under their direction, not to sell the coal involved and not to deliver it to anyone other than the [plaintiff]. * * * [T]his was relief against the sovereign * * *." *Id.* at 688-689. The Court recognized, however, that equitable relief sought against an officer would be available in two kinds of case—first, where the officer was alleged to be acting beyond statutory limitations on his powers, and, second, where the officer was acting within his powers but the statute conferring the powers was alleged to be unconstitutional. *Id.* at 689-690.

Measured by *Larson*'s guidelines, it is clear that suits for damages such as those at issue here do not fit within the types of actions contemplated by the Committee. The Committee must have intended in providing venue for actions "nominally" against the officer and "in essence against the United States * * * to circumvent what remains of the doctrine

of sovereign immunity" those actions maintainable under *Larson*—actions for injunctive relief from conduct alleged to be either *ultra vires* or authorized by an unconstitutional statute. In such cases, and no others, would a plaintiff be able under *Larson* to "circumvent * * * sovereign immunity." H.R. Rep. No. 1936, *supra*, at 4. See *Malone* v. *Bowdoin*, 369 U.S. 643, 647 (1962).

Damages suits never have depended on fictions or evasions of sovereign immunity. Because the official is personally liable, sovereign immunity is irrelevant. Far from depending on the "fiction" that the officer is acting as an individual, such damages suits put the question of his status in issue and require proof that he was actually acting as an individual—*i.e.*, beyond the outer limits of his constitutional or statutory authority.

In short, then, the Committee's statement of the purposes of the bill (to enable actions previously limited to the District of Columbia to be brought elsewhere) and its detailed statement of the purposes of Section 2 (to provide venue for suits that are either against an officer in his official capacity or in essence against the United States) demonstrate that actions against officers individually for damages were not under consideration.[28]

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[28] Professor Byse's contemporary analysis of the bill contained no hint that Section 1391(e) would do anything other than provide venue for "a nonstatutory review action against the subordinate or superior official * * *." Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review*, 75 Harv. L. Rev. 1479, 1513, 1520-1522 (1962).

v. The reference in the committee report to damages actions

Against this evidence that Section 1391(e) was not intended to apply to damages suits such as the present ones, the courts of appeals relied heavily on one sentence in the Committee's report. After discussing the inequity of limiting mandamus jurisdiction to the District of Columbia, and focussing on "[t]he problem of venue [that exists] in actions against Government officials for judicial review of official action" (H.R. Rep. No. 1936, *supra*, at 2), the Committee stated: "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." *Id.* at 3. This reference is odd because, as we have shown, there was no "venue problem" in damages actions against government officials. See pages 11-12, 21-24, *supra*. Such suits were brought throughout the country, and the plaintiffs had only to satisfy conventional rules of jurisdiction and venue. The Committee's statement—otherwise wholly unexplained—is enigmatic; it is too fragile a basis, we submit, for a holding that the Committee intended to override the usual venue rules and provide nationwide venue for actions such as these.

b. *Enactment of the statute in 1962*

H.R. 12622 passed the House in 1960, but the Senate adjourned without acting on it. The same bill was reintroduced in the 87th Congress as H.R.

1960. The House Judiciary Committee republished its earlier report on H.R. 12622 as H.R. Rep. No. 536, 87th Cong., 1st Sess. (1961). The Committee's statement in the latter report is identical to its earlier one.

The bill was referred to the Senate, and the Senate Judiciary Committee solicited comments on it. Deputy Attorney General White responded on behalf of the Department of Justice. S. Rep. No. 1992, 87th Cong., 2d Sess. 5-7 (1962). The courts of appeals relied substantially on those comments as demonstrating that the statute applies to damages actions (Stafford Pet. App. 8a-9a; Colby Pet. App. 11a-12a & nn. 19-21). Placed in context, however, Deputy Attorney General White's comments for the Department of Justice support the opposite result.

The Department's comments stated: "The purpose of [Section 2] of the bill is to have officers who live in the Capital subject to suit throughout the country to the same extent that they can now be sued in the District. In effect, then, this venue provision would do away with the defense that a superior officer is an indispensable party because, with a grant of venue, a superior officer can be made a party." S. Rep. No. 1992, *supra*, at 6. As the prior committee reports demonstrate, this is an accurate statement of Section 2's purposes, and there is no indication that the Senate committee or any member of Congress took issue with it. The letter went on to state: "We believe that less confusion will result by tying in this simple venue grant directly to the Administrative

Procedure Act. This unquestionably eliminates suits for money judgments against officers * * *. It would thus achieve what we understand to be the purpose of the sponsors within the framework of existing legislation." *Ibid.*[29]

The courts of appeals assumed that the Department was proposing a substantive change to the bill (*i.e.*, elimination of venue for damages suits), and they inferred from the fact that the bill was enacted without change that Congress intended the bill to apply to damages actions. This is fallacious reasoning. If the Department of Justice had believed that Section 2 of the bill provided venue in "suits for money judgments against officers," it is inconceivable that the Department would have proposed a change disguised in the name of minimizing "confusion" and "achiev[ing] * * * the purpose of the sponsors." The Department instead would have stated its objections to the substance of the provision. And had the Committee believed that the Department of Justice was trying to bring about substantive changes, one would assume that it would have explicitly addressed such an approach. Yet the Committee's report is devoid of any such discussion on the matter, despite the fact that it devoted a lengthy

[29] The Department's letter also noted that Section 2 covers a subject "entirely different" from Section 1. S. Rep. No. 1992, *supra*, at 6. The *Colby* court apparently found this language significant (Colby Pet. 11a), but it is no more than a recognition that "venue is entirely different from jurisdiction * * *." *Johnson* v. *General Motors Corp.*, 242 F. Supp. 778, 780 (E.D. Va. 1965).

paragraph to discussing the Department's recommendations.

Deputy Attorney General White's letter should be read for what it purported to be—a suggestion for clarification to avoid the possibility that the bill would be construed to mean something (new venue rules for damages actions) Congress did not intend. That the bill was not clarified is regrettable; clarification would have avoided the litigation now before the Court. But Congress' neglect in this respect does not change the substantive scope of the statute. Giving a substantive meaning to legislative inaction is hazardous business at best; here that would be quite unwarranted.

The Senate Judiciary Committee amended the House version of the bill in two respects that are not germane to the present controversy.[30] It reported

[30] Section 1 of the House version gave the district courts jurisdiction to compel an officer, employee or agency to perform "his duty." The Senate changed this language to read "a duty owed to the plaintiff or to make a decision in any matter involving the exercise of discretion." S. Rep. No. 1992, *supra*, at 8. The Committee's purpose was to make it clear that the bill was not providing jurisdiction "to direct or influence the exercise of discretion of the officer or agency in the making of the decision." *Id.* at 2.

The second change was in Section 2. The House version provided venue "in any judicial district where a plaintiff in the action resides, or in which the cause of action arose, or in which any property involved in the action is situated." H. R. Rep. No. 536, *supra*, at 6. The Senate changed this to its present version, to permit suit where the defendant could be found (as existing statutes allowed) and to require that, if real property were involved in the action, venue could not be based on the plaintiff's residence. S. Rep. No. 1992, *supra*, at 1-2.

on the bill favorably, and its report essentially reiterates the House report. Compare S. Rep. No. 1992, *supra*, at 2-4 with H.R. Rep. No. 536, *supra*, at 1-4. As the House Committee had done, the Senate Committee stated that the purpose of the bill was "to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." S. Rep. No. 1992, *supra*, at 2.[31]

[31] The House Reports had stated: "This bill is directed primarily at facilitating review by the Federal courts of administrative actions." H.R. Rep. No. 1936, *supra*, at 1; H.R. Rep. No. 536, *supra*, at 1. The court of appeals in *Colby* concluded: "Even if we were to acknowledge that the primary purpose of § 1391(e) was to expand venue in mandamus cases, that would not preclude it from serving other purposes as well." Colby Pet. App. 13a. This reasoning overlooks the language in the Senate report, which states: "The bill, as amended, is *intended* to facilitate review by the Federal courts of administrative actions." S. Rep. No. 1992, *supra*, at 2 (emphasis added). The Senate Committee's choice of language refutes the court's inference that the bill had a secondary purpose of providing venue in damages actions against government officers personally.

The Senate report, although repeating *verbatim* the House reports' description of the inequities of mandamus jurisdiction, did not repeat the House reports' lengthy statement of the purpose of Section 2, which we discuss at pages 34-37, *supra*. There is no indication from any source that the Senate Committee disagreed with that discussion, however, and nothing in the Senate report is inconsistent with that discussion.

The Senate report repeated the House reports' statement of the "venue problem" in damages actions (compare S. Rep. No.

Because both the House and Senate versions of the bill defined the jurisdictional portion (Section 1) in somewhat imprecise terms,[32] Deputy Attorney General Katzenbach wrote to floor managers in both chambers expressing fear that the bill might be subject to "varying interpretations" unless it were amended to refer specifically to actions "in the nature of mandamus." He proposed such a change "to remove all doubt that the legislative intent of the bill is to do nothing more than extend to all U.S. district courts jurisdiction in mandamus actions against Federal officials and employees." 108 Cong. Rec. 20079 (1962). Senator Carroll, the floor manager in the Senate, stated on the floor: "[A]fter consultation with the Department [of Justice] and with the interested parties in the other body, it was agreed that the suggested language would accomplish the legislative purpose we were seeking." *Ibid.* The Senate and the House accordingly amended the bill to limit it to an "action in the nature of mandamus" and passed it that day without opposition.[33] 108 Cong. Rec. 20079 (1962); 108 Cong. Rec. 20093 (1962); see

1992, *supra*, at 3, with H.R. Rep. No. 536, *supra*, at 3) but shed no more light than the House Committee had on what that language meant.

[32] See note 30, *supra*.

[33] Recent legislation demonstrates a continued understanding by Congress that Section 1391(e) deals only with suits in the nature of mandamus. The original statute dealt only with cases in which "each" defendant was a federal employee,

generally Byse and Fiocca, *supra*, 81 Harv. L. Rev. at 315-318.

When the bill was sent to the President for signature, Deputy Attorney General Katzenbach wrote to the Director of the Bureau of the Budget explaining that, because the bill had been amended to refer specifically to actions "in the nature of mandamus," the Department recommended approval. The Deputy Attorney General noted, however:

> While we believe that this bill should not be read as doing more than giving effect to the Congressional purpose to extend the mandamus jurisdiction of the District Court for the District of Columbia to other district courts throughout the country, there are portions of the legislative history which could suggest a broader grant of power. Accordingly we suggest that the President may wish to issue an announcement at the time he signs the bill making it clear that he considers the limited purpose controlling.

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and disputes arose about whether the inclusion of a non-federal defendant made Section 1391(e) inapplicable. Congress amended the statute in 1976 to change "each defendant" to "a defendant;" Congress also added a provision that the non-federal defendants are subject to conventional rules of venue. Pub. L. No. 94-574, Section 3, 90 Stat. 2721-2722. In recommending this amendment, the committee stated that the statute applies "in actions against the United States, is agencies, or officers or employees in their official capacities * * *." H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 1 (1976). Neither the committee nor anyone else said in 1976 that Section 1391(e) applies to damages actions against officers or employees as individuals.

App., *infra*. The President followed the Deputy Attorney General's suggestion and issued a statement that the bill "will extend to all district courts the same jurisdiction heretofore enjoyed solely by the District Court for the District of Columbia to hear actions in the nature of mandamus against Government officials." 1962 Pub. Papers of the President 738.[34]

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[34] On January 18, 1963, some three months after the President signed the Act into law, a memorandum (a copy of which we are lodging with the Clerk of this Court) was sent over Deputy Attorney General Katzenbach's signature to all United States Attorneys providing tactical advice and case citations to be used in defending suits brought under the new Act. One paragraph of that memorandum (which the United States discovered after this litigation had begun and which we brought to the attention of the parties and the courts below) contained the following statements (page 7):

> The venue provision is applicable to suits against Government officials and agencies for injunctions and damages as well as suits for mandatory relief. By including in the venue provision the phrase "or under color of legal authority" the statute makes the expanded venue applicable not merely to actions for mandatory relief but also to actions in which the defendant Government official is alleged to have taken or is threatening to take action beyond the scope of his legal authority although purporting to act in his official capacity. * * * As an example, suits for damages for alleged libel or slander by Government officials * * * fall within the venue provision of this statute. * * *

It is impossible to reconcile this statement with the unequivocal statements of Deputy Attorney General Katzenbach to the Congress and to the President that the Act was intended to apply only to mandamus actions. The best explanation of these statements in the memorandum is that they are wrong.

C. Section 1391(e) Should Be Read To Make It Harmonious With The Venue Provisions For Other Damages Actions

Section 1391(e) creates a venue rule quite unlike the venue rules for diversity and federal question cases (Section 1391(a) and (b)), and the legislative history of Section 1391(e) indicates that Congress was concerned with the historical anomaly that had confined mandamus actions to the District of Columbia, rather than with problems of venue in damages suits. Many courts, including this Court in *Schlanger* v. *Seamans*, *supra*, therefore have declined to give the statute its broadest possible reading. It is not appropriate to approach Section 1391(e) "simply as a text to be parsed with such aid as the dictionary and grammar afford and without adequately considering the history of the statute and the evil it was designed to cure." *Natural Resources Defense Council, Inc.* v. *TVA*, 459 F.2d 255, 257 (2d Cir. 1972).[35]

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[35] In that case the court of appeals held that Section 1391(e) did not authorize an environmental group to sue the TVA in New York in order to litigate the TVA's decision to buy surface-mined coal. Because TVA always had headquarters outside the District of Columbia, it had not been subject to the indispensable defendant problem. The court of appeals held that "essentially local" federal agencies must be sued where they are located (459 F.2d at 259). In an earlier case the Second Circuit held that Section 1391(e) does not apply to suits against Senators or employees of Congress, reasoning that the statute was designed only to permit convenient review of administrative action. *Liberation News Service* v. *Eastland*, 426 F.2d 1379, 1383-1384 (1970).

Many other cases hold that Section 1391(e) does not apply to damages actions. See, *e.g.*, *Bertoli* v. *SEC*, No. 77 Civ. 1450 (S.D.N.Y. Nov. 4, 1977) (reprinted at Stafford Pet. App. 32a-36a); *Kenyatta* v. *Kelley*, 430 F. Supp. 1328 (E.D. Pa. 1977); *Writers Guild of America* v. *FCC*, 423 F. Supp. 1064, 1159 (C.D. Cal. 1976) (dicta); *Rimar* v. *McCowan*, 374 F. Supp. 1179 (E.D. Mich. 1974); *Davis* v. *Federal Deposit Insurance Corp.*, 369 F. Supp. 277 (D. Colo. 1974). Contra, *Ellingburg* v. *Connett*, 457 F.2d 240 (5th Cir. 1972); *Lowenstein* v. *Rooney*, 401 F. Supp. 952 (E.D.N.Y. 1975); *Wu* v. *Keeney*, 384 F. Supp. 1161 (D.D.C. 1974). Some courts also have relied on Section 1391(e) to provide venue of damages actions in the place where the claim arose. See, *e.g.*, *Patmore* v. *Carlson*, 392 F. Supp. 737 (E.D. Ill. 1975). This is unnecessary, because Section 1391(b) allows any federal question case to be litigated where the claim arose.

Under the court of appeals' holding in *Colby* petitioners will be subjected to discovery and trial in Rhode Island because one of the respondents lives there. Nothing that is at all relevant to respondents' complaint took place there, and the petitioners have no connection with that district. The complaint could as well have been filed in Alaska or Hawaii or New Mexico; indeed, because the mail opened in New York was bound for many states, petitioners could have been sued in Alaska *and* Hawaii *and* New Mexico. Each of those federal districts has as much connection with the litigation as Rhode Island does. In *Stafford* the complaint was filed in the District of Columbia, even thought the events of which respondents complained took place in Florida and all of the defendants save one live there. As in *Colby*, the complaint could as well have been filed in any district where a plaintiff lived.

A "result * * * so eccentric," as Judge Friendly characterized it in *Natural Resources Defense Coun-*

cil, Inc. v. *TVA, supra,* 459 F.2d at 257, is contrary to longstanding principles of venue. "[V]enue is primarily a matter of convenience of litigants and witnesses." *Denver & R.G.W. R.R.* v. *Brotherhood of Railroad Trainmen,* 387 U.S. 556, 560 (1967). "Historically, venue has been geared primarily to the convenience of the defendant rather than that of the plaintiff since it is the defendant who is being brought into court." *Reuben H. Donnelley Corp.* v. *FTC,* 580 F.2d 264, 269 (7th Cir. 1978). And, "in terms of traditional venue considerations, * * * the most desirable forum for the adjudication of the claim * * * is in [the district] where all of the material events took place [and where] the records and witnesses pertinent to [the] claim are likely to be found," at least where that forum is "no less convenient" to the defendant than it is to the plaintiff. *Braden* v. *30th Judicial Circuit Court,* 410 U.S. 484, 493-494 (1973) (footnotes omitted).

Section 11 of the Judiciary Act of 1789, this nation's first venue statute, provided that "[N]o civil suit shall be brought * * * against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found * * *." Act of September 24, 1789, ch. 20, 1 Stat. 73, 79. Even this defendant-oriented provision resulted in abuse by plaintiffs who followed defendants to distant places to serve them, and so venue laws in 1887 and 1888 narrowed the provision to "permit[] civil suits to be instituted only in the district of which the defendant was an in-

habitant, except that in diversity jurisdiction cases suit could be started in the district of the plaintiff's or the defendant's residence." *Stonite Products Co.* v. *Melvin Lloyd Co.,* 315 U.S. 561, 563-564 (1942).

In federal question cases, venue remained limited to the district of the defendant's residence until 1966, when Congress provided that, in both diversity and federal question cases, suit also could be brought in the district in which the claim arose. Pub. L. No. 89-714, 80 Stat. 1111. To this day, an action not based solely on diversity of citizenship may not be brought in the district where the plaintiff lives, unless specifically provided by law.[36]

As this brief overview suggests, statutes allowing a plaintiff to bring suit where he resides, without regard to where the claim arose or where the defendant resides, are exceptional—so exceptional that this Court has refused to allow plaintiffs to bring such suits when the statute they invoke appears to have been written with narrower ends in mind. *Robertson* v. *Railroad Labor Board,* 268 U.S. 619 (1925). The legislatiye history of Section 1391(e) indicates that Congress did not conclude that there was need for such an exceptional rule in damages actions against federal employees.

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[36] Such special provisions include 28 U.S.C. 1402 (suit against United States under Tucker Act may be brought where plaintiff resides); 28 U.S.C. 1398 (action to enjoin or suspend ICC order may be brought where any plaintiff resides or has its principal office). Cf. 28 U.S.C. 1391(d) (alien may be sued in any district; see *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.,* 406 U.S. 706 (1972)).

As we have discussed, Congress altered the anachronistic rule that had confined mandamus cases to the nation's capital, no matter how local the underlying dispute and no matter how inconvenient to the plaintiff litigation in the District of Columbia might be. Congress was influenced in its decision to change this situation by the fact that broadening venue in mandamus cases would not work hardship on the United States, because the actions were in essence against the United States, which was present and represented in each judicial district by the United States Attorney. H.R. Rep. No. 1936, *supra*, at 3; H.R. Rep. No. 536, *supra*, at 3; S. Rep. No. 1992, *supra*, at 3.

But this balancing of interests assumes that one side can benefit from changing the rules and the other side will not suffer. Such an assumption is valid for mandamus actions. They are essentially lawyers' actions, at least from the government's perspective. The committees acknowledged as much when they referred to the presence in each district of the United States Attorney, implying (and correctly so) that his presence would alleviate most inconvenience to the government in mandamus suits. The committees did not mention the inconvenience caused to witnesses and government officials, presumably because they recognized that mandamus suits normally do not require officials to participate. See *United States* v. *Morgan*, 313 U.S. 409, 422 (1941). Mandamus cases test the lawfulness of particular acts. Facts often are stipulated or undisputed, and as

a result factual controversy takes a back seat to legal issues. Indeed, the government often declines to contest the reviewing court's jurisdiction under the mandamus statute because it is more interested in obtaining a decision on the legality of its policies than in arguing about which court should hear the case. See *Christian* v. *New York Department of Labor*, 414 U.S. 614, 617 n. 3 (1974); *United States* v. *Testan*, 424 U.S. 392, 401 n. 5 (1976). This impersonal approach is possible because the official whose acts are being reviewed is in no personal jeopardy. Public questions, not individual liability, are at stake.

Damages actions against government officials personally are an entirely different matter. The alleged liability may arise from something the defendant did while wearing his government official's hat, but from the day the complaint is filed the suit is no different from a private damages action. The defendant's personal funds are in jeopardy. Like a motorist in an auto collision case or a surgeon in a malpractice action, he has every motivation to dispute facts, to put the plaintiff to his proof, to raise any collateral matter that the law allows and the official perceives as serving his interests, regardless of its connection to his official acts or even to the merits of the dispute. The litigation is not a judicial review of his official acts but a threat to his personal finances, his reputation and his peace of mind. It cannot be left at the office when the defendant goes home for the night.

He fights the action. He plans strategy in consultation with the lawyers defending him. He is deposed.

He must answer interrogatories. He is, in short, haled into court like any other citizen might be to answer for his actions, and the seriousness of the litigation is not even slightly diminished because he is (or once was) on the government's payroll. There is no reason why the identity of his employer should subject him to suit in some far away place that is outside the scope of federal question venue under Section 1391(b).[37] Public duties may have provided the opportunity to infringe another's rights, and the official may wrongfully have done so, but plaintiffs in such cases have access to the same venue rules as those in any federal question case, and the official should have the benefit of those rules. The official is defending his person, not merely some public policy.

If Congress had specifically (albeit perhaps unwisely) prescribed that the venue rules be changed to the substantial advantage of the plaintiff in a damages action against a government official, it would

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[37] 28 U.S.C. 1404(a), which authorizes a district court "[f]or the convenience of parties and witnesses, in the interest of justice," to transfer an action to any other district in which it might have been brought, does not adequately meet these concerns. Because "§ 1404(a) operates on the premise that the plaintiff has properly exercised his venue privilege" (*Van Dusen* v. *Barrack*, 376 U.S. 612, 634 (1964) (footnote omitted)), the burden is on the defendant to show that transfer is appropriate, and the plaintiff's choice "should not be lightly disturbed." 1 J. Moore, *Federal Practice* ¶ 0.145[5], at 1616 (1974 ed.). What is more, it is nearly impossible to obtain review of an erroneous decision not to transfer a case, because the decision is interlocutory. Some circuits refuse to review such a decision at all, and the other circuits allow review by mandamus only if there is a clear abuse of discretion. *Id.* at ¶ 0.147.

be his bad fortune. See note 1, *supra*. But Congress has not spoken with such clarity. This Court is being asked to infer that Congress intended a departure from conventional rules of venue in a situation where such a departure makes no sense. It should decline the invitation. The provisions of 28 U.S.C. 1391(a) and (b) perform very well in all sorts of private disputes, as Congress intended that they should. They represent Congress' judgment of what is fair, and they are readily available to these respondents. Section 1391(e), on the other hand, is so out of harmony with traditional principles of venue that this Court should hold that it applies only in the special cases for which it was designed and for which it works fairly.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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MARCH 1979

APPENDIX

September 25, 1962

Honorable David E. Bell
Director, Bureau of the Budget
Washington, D.C.

Dear Mr. Bell:

In compliance with Mr. Hughes' request, I have had examined a facsimile of the enrolled bill (H.R. 1960) "To amend chapter 85 of title 28 of the United States Code relating to the jurisdiction of the United States district courts, and for other purposes."

As indicated by the Committee Reports (H. Rept. No. 536 and S. Rept. No. 1922) the purpose of the bill is to make it possible to bring original actions in the nature of mandamus against Government officials and employees in all United States district courts. Such actions at present can be brought only in the United States District Court for the District of Columbia.

The Department's report of February 28, 1962 on this bill as passed by the House July 10, 1961 is set forth in the Senate Committee Report. In that report the Department questioned the wisdom of authorizing district courts generally to mandamus Cabinet officers and other Government officials. However, and without recommending legislation in this field, the Department submitted revised language to accomplish the stated purpose of the legislation. The Senate adopted some of the Department's suggestions but

the bill as amended and passed by the Senate on September 6, 1962 remained objectionable primarily because the language chosen to effect its purpose was susceptible to varying interpretations which it is believed could have resulted in the creation of a remedy quite different from mandamus.

Upon further consideration of this legislation, the Department concluded that it could support the enactment of the bill if the language of proposed section 1361 was modified to show clearly that the purpose of the bill was to do nothing more then to extend to all United States district courts jurisdiction in mandamus actions. The Department suggested language to effect this purpose and except for the omission of the word "of" preceding the language "any agency", the language of the enrolled bill is identical with that suggested by this Department. The omission of the word "of" is not regarded as of sufficient importance to warrant withholding approval of the bill.

While we believe that this bill should not be read as doing more than giving effect to the Congressional purpose to extend the mandamus jurisdiction of the District Court for the District of Columbia to other district courts throughout the country, there are portions of the legislative history which could suggest a broader grant of power. Accordingly we suggest that the President may wish to issue an announcement at the time he signs the bill making it clear that he considers the limited purpose controlling. An appropriate form of such statement is attached for your convenience.

The Department of Justice recommends approval of this measure.

Sincerely yours,

NICHOLAS DEB. KATZENBACH
Deputy Attorney General

IMMEDIATE RELEASE OCTOBER 5, 1962

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

I have today signed H.R. 1960 which corrects an historic anomaly in the jurisdiction of the United States courts. While the bill creates no new remedies, it will extend to all district courts the same jurisdiction heretofore enjoyed solely by the District Court for the District of Columbia to hear actions in the nature of mandamus against Government officials. Thus it will no longer be necessary for citizens throughout the country to come to the District of Columbia to maintain actions against government officials.

JOHN F. KENNEDY

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